(24,573)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 360.

DAN O'NEIL, PLAINTIFF IN ERROR,

vs.

THE NORTHERN COLORADO IRRIGATION COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 STATE OF COLORADO, *ss:*

Pleas in the Supreme Court of the State of Colorado.

Present:

Hon. John Campbell, Chief Justice;
" Geo. W. Musser,
" Wm. H. Gabbert,
" S. Harrison White,
" Wm. A. Hill,
" James E. Garrigues, and
" Morton S. Bailey, Justices;
Benjamin Griffith, Esq., Attorney General;
Mr. James R. Killian, Clerk, and
Mr. Wm. T. Heiskell, Bailiff.

Be it remembered That heretofore and on, to-wit, the 31st day of August, A. D. 1912, there was filed in our said Court a certain Transcript of Record, in words and figures following, to-wit:

2 UNITED STATES OF AMERICA,
State of Colorado, County of Park, ss:

In the District Court, May Term, A. D. 1912.

Pleas Before the Honorable Charles Cavender, Judge of the Fifth Judicial District of the State of Colorado, Sitting in and for the Honorable Charles A. Wilkin, Sole Presiding Judge of the Eleventh Judicial District of the State of Colorado, in and for the County of Park, at a term thereof, begun and held at the Court House in the Town of Fairplay in said County, on the first day (being the 20th day of May in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-six).

Present:

Honorable Charles Cavender, Judge.
James T. Locke, Esq., District Attorney.
S. W. Decker, Sheriff.

Attest:
P. W. O'BRIEN, *Clerk.*

Be it remembered, That heretofore and on the 20th day of May A. D. 1912, the same being one of the days of the May A. D. 1912 Term of said District Court, the following proceedings, inter alia, were had and done, to-wit:

3 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Complaint.

Comes now the plaintiff, complaining of the said several defendants, and for grounds for his complaint, and for his cause of action alleges:

First. That the said defendants, The Northern Colorado Irrigation Company, is a corporation organized and existing under and by virtue of the laws of the State of Colorado.

Second. That the defendant, Charles W. Comstock, is now, and during the years 1910 and 1911, was, the duly appointed and qualified and acting State Engineer of the State of Colorado; that the defendant, Fillmore Cogswell, is now, and during the years 1910 and 1911, was, the duly appointed, qualified and acting Division Engineer of Irrigation Division No. 1, in the State of Colorado, and that the defendant, Alonzo Wright, is now, and during the years 1910 and 1911 was, the duly appointed and qualified and acting Water Commissioner in and for Water District No. 23, in the State of Colorado; that the three last named defendants will be designated hereinafter as the water officials.

4 Third. That the plaintiff is the owner of a water right known and designated as priority No. 98, out of Tarryall Creek, a natural stream, tributary to the South Platte river, in Water District No. 23, and situate in said County of Park and State of Colorado.

That the said water right was acquired by the plaintiff on, to-wit: May 10th, 1879, by the diversion of water from the said stream and the application thereof to a beneficial use, to-wit, the irrigation of land for agricultural purposes, and the raising of crops.

That the said water was so diverted from the said stream and applied to such beneficial use, by means of a ditch named and known as the O'Neil Ditch. That the said water right and the amount of water so diverted and beneficially applied, consists of twenty eight and eighty three hundredths (28.83) cubic feet of water per second of time, flowing in and through said ditch, and dates from the said 10th day of May, A. D. 1879.

Fourth. That on the 18th day of October, A. D. 1889, in the said District Court in and for the said County of Park, in a proceeding then pending in said Court, designated as case No. 341, and

entitled as follows: "In the matter of the application of Edwin R. Crosier and Samuel Taylor for the adjudication of the priorities of right to the use of water for irrigation between the several ditches, canals and reservoirs in water district No. 23 in the State of Colorado"; in which proceedings the court had jurisdiction of the subject matter and of the parties thereto, a decree was duly made and entered by said court, wherein and whereby it was adjudged and decreed, inter alia, that the said O'Neil Ditch was entitled to a priority of 28.83 cubic feet of water per second of time, for purposes of irrigation, from the said Tarryall Creek, for the use and benefit of the persons lawfully entitled thereto, and that said priority No. 98, in said Water District No. 23, That the said decree has never been changed, modified or reversed, and is now in full force and effect.

Fifth. That since the said 10th day of May, A. D. 1879, the plaintiff and his grantors have been the owners of, and in possession of, the said O'Neil Ditch, and the said water right decreed to the same, and the plaintiff is now the owner of the said ditch and the said water right, in fee, and is in possession of both the said ditch and the said water right, by his tenant, and is using the water constituting the said priority, and in the irrigation of land owned and possessed by him.

Sixth. That the said defendant, The Northern Colorado Irrigation Company, is making a claim of some estate, right, title or interest, in and to the said water constituting the said water right or priority of the plaintiff, adverse to and conflict- with, plaintiff's rights, and is claiming a right to the use of the water so appropriated through and decreed to the said O'Neil Ditch, and owned by the plaintiff; and is claiming the right to the use of the water in the said South Platte river, including the water of said Tarryall Creek, and especially the water constituting plaintiff's said priority, to the exclusion of the plaintiff's right to the use of such water, and as a right prior and superior to plaintiff's said right.

That the said claim and demand of the defendant, The Northern Colorado Irrigation Company, is unjust; is without any right whatever, either in law or equity, and is wholly unfounded. That the said defendant is without any estate, right or title, in or to the said priority No. 98, so decreed out of said Tarryall Creek, to the plaintiff as the owner, or any right, title or interest in or to any part or portion of the water constituting said priority; and the said defendant is without any right or title to the use of water out of said South Platte river or out of said Tarryall Creek, prior or superior to plaintiff's said right under and by virtue of his said priority No. 98.

Seventh. That during the years 1910 and 1911, the defendant water officials, upon the demand and at the instigation of their said co-defendant, The Northern Colorado Irrigation Company, closed plaintiff's said ditch and demanded that the same be and remain closed, and that the water decree- to the same, to-wit, priority No. 98, be allowed to flow past said ditch and down the stream, for the use and benefit of the said The Northern Colorado Irrigation Company.

That plaintiff is informed and believes and upon such information and belief alleges, that the said water officials, in demanding that plaintiff's said ditch be closed, and in closing the same, did so and by reason of and pursuant to the said claim of The Northern Colorado Irrigation Company, of ownership, and priority, and adverse to plaintiff's right to the use of said water.

Eight. That the said claim of the defendant, The Northern Colorado Irrigation Company, and the aforesaid acts of the water officials, in closing plaintiff's said ditch, pursuant to said claim, are all without right and contrary to law, and cast a cloud upon plaintiff's title to his said water right.

Wherefore, the plaintiff prays for judgment and decree:

1. That the defendant, The Northern Colorado Irrigation Company, be required to set forth and disclose the nature of the adverse claim or claims of its prior or superior right to the water constituting plaintiff's said priority No. 98; that such claim or claims be
7 settled, determined and adjudicated by a decree of this Honorable Court, and that by such decree it be determined, declared and adjudged that the said defendant is wholly without any right, title, estate, claim or demand in or to the water in the said South Platte river, or its tributary, Tarryall Creek, and especially in or to the water constituting plaintiff's said priority, prior or superior or adverse to plaintiff's title to his said priority and to the use of the water constituting the same, be quieted in his and in his heirs and assigns forever. And be forever established and confirmed in favor of the plaintiff as against the said defendant, and against any and all persons claiming by, through or under it; and that the said defendant, its successors and assigns be perpetually enjoined from thence forth asserting any claim or estate whatsoever in or to or against the said water, constituting the plaintiff's said priority or any part or portion thereof.

2. That the said defendant water officials be required to set forth and declare their right and authority under and pursuant to which they have heretofore closed plaintiff's said ditch and have demanded and are demanding that plaintiff's said ditch be and remain closed, and that the water constituting plaintiff's said priority be permitted to pass down the stream, past plaintiff's said ditch, for the use and benefit of the defendant, The Northern Colorado Irrigation Company; and for a decree judging that the said water officials have no right or authority to deprive the plaintiff of the water constituting his said priority, and deliver the same to their co-defendant, The Northern Colorado Irrigation Company; and that the said water officials and their successors in office be perpetually enjoined from closing the headgate of plaintiff's said ditch, at the instance and request of The Northern Colorado Irrigation Company, de-
8 fendant, and from depriving the plaintiff of the water constituting his said priority, for the purpose of supplying the said water to the said The Northern Colorado Irrigation Company.

3. For such other, further and general relief as may be just and equitable in the premises.

4. For costs of this suit.

G. K. HARTENSTEIN,
Attorney for Plaintiff.

9 STATE OF COLORADO,
County of Chaffee, ss:

G. K. Hartenstein, being first duly sworn, upon his oath deposes and says, that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true; that he makes this verification as attorney for the plaintiff, for the reason that the plaintiff is absent from the County of Chaffee, where he, the affiant, resides, and for the further reason that the facts are within his knowledge.

G. K. HARTENSTEIN.

Subscribed and sworn to before me this 19th day of February, A. D. 1912. My commission expires May 11th, 1915.

[SEAL.] HARRY L. McGINNIS,
Notary Public.

Endorsed thereon: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al., Defendants. Complaint. Filed February 21st, 1912. P. W. O'Brien, Clerk of the Dist. Court.

10 Be it remembered, that heretofore and on the 18th day of March, 1912, there was filed in the Office of the Clerk of said Court, a certain Summons, heretofore and on the 21st day of February, 1912, was issued out of the said Court, by the Clerk thereof, in words and figures as follows, to-wit:

11 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Summons.

The People of the State of Colorado to The Northern Colorado Irrigation Company, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, the defendants above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of Park County, State of Colorado, and answer the complaint therein within twenty days after the service thereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service thereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

12 And if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days' additional to the time hereinbefore specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to quiet plaintiff's title to his water right, being priority No. 98, in Water District No. 23, in the County of Park and State of Colorado, and that the defendant, The Northern Colorado Irrigation Company, be required to set forth and disclose the nature of the adverse claim or claims of its prior or superior to the water constituting plaintiff's said priority No. 98.

That such claim or claims be settled, determined and adjudicated by a decree of this Honorable Court, and that by such decree it be determined, declared and adjudged, that the said defendant is wholly without any right, title, estate, claim or demand in or to the water in the South Platte river, or its tributary, Tarryall Creek, and especially in or to the water constituting plaintiff's said priority, or superior or adverse to plaintiff's right and title to the same. That plaintiff's title to his said priority and to the use of the water consti-

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tuting the same, be quieted in him and in his heirs and assigns forever, and be forever established and confirmed in favor of the plaintiff as against the said defendant, and against any or all persons claiming by, through or under it; and that the said defendant, its successors and assigns be perpetually enjoined from thenceforth asserting any claim or estate whatsoever in or to or against the said water, constituting the plaintiff's said priority or any part or portion thereof.

That the defendant water officials be required to set forth and declare their right and authority under and pursuant to which they have heretofore closed plaintiff's ditch and have demanded
13 and are demanding that plaintiff's said ditch be and remain closed, and that the water constituting plaintiff's said priority be permitted to pass down the stream, past plaintiff's said ditch, for the use and benefit of the defendant, The Northern Colorado Irrigation Company; and for a decree adjudging that the said water officials have no right or authority to deprive the plaintiff of the water constituting his said priority, and delivering the same to their co-defendant, The Northern Colorado Irrigation Company; and that said water officials and their successors in office, be perpetually enjoined from closing the headgate of plaintiff's said ditch, at the instance and request of The Northern Colorado Irrigation Company, defendant, and from depriving the plaintiff of the water constituting his said priority, for the purpose of supplying the said water to the said The Northern Colorado Irrigation Company. For such other, further and general relief as may be just and equitable in the premises, and for costs of this suit.

Given under my hand and the seal of the said Court at Fairplay, in said county, this 21st day of February, A. D. 1912.

[SEAL.] P. W. O'BRIEN,
Clerk of the District Court.

14 Endorsed thereon: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al., Defendants. Summons. Received. Sheriff's Office, 10.10 o'clock A. M. 2/23 1912. Hamilton Armstrong, Sheriff, City and County of Denver, Colorado, by F. H. Long, Deputy. Sheriff fees, $1.80. Pd. F. H. Long. Filed March 18th, 1912. P. W. O'Brien, Clerk of the District Court.

And attached to the within summons, is the certificate of the Sheriff of Jefferson County, Colorado, and that of the Sheriff of the City and County of Denver, Colorado, in words and figures, respectively, as follows, to-wit:

15 STATE OF COLORADO,
County of Jefferson, ss:

I do hereby certify that I received the within Summons on the 5th day of March, A. D. 1912, and that I have duly executed the same this 6th day of March, A. D. 1912, by delivering to and leaving with

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H. F. Wright, who is over the age of fifteen years and a member of the household of Alonzo Wright, the defendant, at his usual place of abode, the above named defendant being Water Commissioner of Water District No. 23, in the State of Colorado, a true copy of the within summons together with a true copy of the complaint in the action therein mentioned, thereto attached, in the said County of Jefferson.

JOS. DENNIS, JR.,
Sheriff of Jefferson County.

Sheriff's fees:

120 miles	$12.00
Service	1.00
Team hire	2.50
	$15.50 paid by plaintiff.

STATE OF COLORADO,
City and County of Denver:

I do hereby certify that I have duly executed the within summons this 23rd day of February, A. D. 1912, by handing to and leaving with the within named defendants, Charles W. Comstock, as State Engineer of the State of Colorado, and Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, each of them personally, in the City and County of Denver, Colorado, a true copy of the within summons, together with a true copy of the complaint in the action therein mentioned, thereto attached.

HAMILTON ARMSTRONG, *Sheriff,*
By P. J. SULLIVAN, *Deputy.*

16 I further executed the within summons on the second day of March, 1912, by handing to and leaving with S. J. Gilmore, the President of and for the within named defendant, The Northern Colorado Irrigation Company, a Corporation, in the City and County of Denver, Colorado, a true copy of the within summons, together with a true copy of the complaint in the action therein mentioned, thereto attached.

HAMILTON ARMSTRONG, *Sheriff,*
By P. J. SULLIVAN, *Deputy.*

17 And be it remembered, further that heretofore and on the 26th day of March, A. D. 1912, there was filed in the office of the Clerk of the said Court, a certain answer by the defendants herein, in words and figures as follows, to-wit:

18 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Answer.

Comes now the defendant, The Northern Colorado Irrigation Company, and for separate answer to plaintiff's complaint, says:

First. That it admits the allegations contained in paragraphs numbered "First" and "Second" in said complaint.

Second. That as to the truth or falsity of the allegations contained — Paragraphs numbered "Third," Fourth," "Fifth" and "Seventh" of said complaint this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Third. That as to the allegations contained in Paragraph numbered "Sixth" of the complaint herein, this defendant says
19 that Tarryall Creek from which plaintiff claims his water right for the said O'Neil Ditch is a tributary of the South Platte River; that this defendant is the owner of The Northern Colorado Irrigation Company's Canal, commonly called the High Line Canal, taking water for Irrigation purposes from the South Platte river below the mouth of Tarryall Creek and having its headgate located in Water District No. 8, Irrigation Division No. 1; and that said defendant has a decreed priority for said High Line Canal as of January 18, 1879, for Eleven Hundred and Eighty-four (1184) cubic feet of water per second of time from the South Platte river and its tributaries, which priority is senior to the priority claimed by the plaintiff, and that any taking of water from said river by this defendant charged in said complaint was by virtue of its senior right so decreed to it; that at the time of the committing of the alleged grievances set forth in said complaint, and at all times during the irrigation season this defendant needed and required the water decreed to its said ditch for the use of its consumers owning land under said canal for the irrigation of the said lands, and that this defendant has at all time claimed, and does now claim, that its said priority right so decreed to its ditch is senior to and must be supplied prior to the alleged priority charged to have been decreed to plaintiff's ditch; and that this defendant denies each and every allegation contained in said Paragraph numbered "Sixth" and said complaint.

Fourth. That this defendant denies each and every allegation contained in Paragraph numbered "Eight" of the said complaint.

Fifth. That this defendant further answering the complaint herein alleges that it is the owner of the Northern Colorado Irrigation Company's canal, commonly called the High Line Canal,
20 diverting water from the South Platte river, and having its headgate located on the west bank of said South Platte river near the mouth of Platte Canon in Douglas county, Colorado, in Water District No. 8, Irrigation Division No. 1, State of Colorado; that it supplies water, and that it has for more than twenty-three years last past supplied water, to its consumers under said canal for irrigation purposes; that Tarryall Creek, from which plaintiff claims to divert water by his said O'Neil Ditch, is a tributary of the South Platte river emptying into said river above the headgate of defendant's canal; that on to-wit: the tenth day of December, 1883, in the District Court of Douglas county, Colorado, said Court being in Water District No. 8, Irrigation Division No. 1, of said State, and having jurisdiction to adjudicate and determine the water rights and priorities for irrigation purposes in said District, in a certain proceeding then pending in said Court for the purpose of adjudicating the water rights and priorities for irrigation purposes in said Water District No. 8, Irrigation Division No. 1, State of Colorado, and in which proceeding the Court had duly obtained and had jurisdiction of the subject matter and of the parties thereto and interested in the diversion and use of water for irrigation purposes in said Water District No. 8, a decree was duly made and entered by said Court wherein and whereby it was Ordered, Adjudged and Decreed inter alia that the said The Northern Colorado Irrigation Company, this defendant, was entitled to a priority of right to the use of water for irrigation purposes of Eleven Hundred and Eighty-four (1184) cubic feet of water per second of time from the South Platte River and its tributaries; that said priority was of date of January 18, 1879, and was priority No. 111 in said Water District No. 8; that said decree has ever since remained in full force and effect, and has never been reversed, appealed from or modified in any re-
21 spect, and that said The Northern Colorado Irrigation Company's ditch, and said priority so decreed thereto, are now owned by this defendant, and that the diversion of water complained of by the plaintiff herein was diverted by this defendant through said ditch under and by virtue of said priority so decreed to it; and that all water that has ever been diverted or can be diverted, by said defendant's aforesaid ditch, has been needed and required for the proper irrigation of the lands lying under said ditch and for the use of the consumers of water therein; that this defendant claims, diverts and uses the water from the said South Platte River and its tributaries through the said The Northern Colorado Irrigation Company's Canal under and by virtue of its appropriation as evidenced by said decree, and that said decree is senior to any right claimed by the plaintiff herein, and that such diversion by this defendant is the same alleged grievances complained of in said complaint; that all matters determined in said proceeding in the said District Court of Douglas County, Colorado, are res adjudicata and cannot be questioned or relitigated by plaintiff or others.

And this defendant further answering says that said decree adjudicating water to the said The Northern Colorado Irrigation Company's canal has been in full force and effect ever since its entry, and for many years to-wit, four years prior to the bringing of this action; that this defendant has at all times since its appropriation of January 18, 1879, and also since the entry of said decree diverted and used the water under said decree in the same manner as at the times complained in the complaint, and that the said Water Commissioner, Irrigation Division Engineer and State Engineer have at all time given full recognition to said decree of this defendant,
22 and have distributed water for this defendant thereunder; that if plaintiff has or ever had any cause of action against this defendant by reason of defendant's use of water from the South Platte river and its tributaries, said cause of action accrued more than four years prior to the bringing of this action, and is, therefore, barred by limitation of time, and this defendant pleads its decree and the lapse of time aforesaid since its rendition as a bar to the further prosecution of this action.

Wherefore, the defendant, The Northern Colorado Irrigation Company having answered fully the allegations of the complaint herein, prays that the complaint be dismissed and that the defendant, The Northern Colorado Irrigation Company, go hence without day, and that it have its costs in this behalf expended.

PAUL M. CLARK,
C. O. EPPERSON,
Attorneys for The Northern Colorado Irrigation Company.

23 STATE OF COLORADO,
City and County of Denver, ss:

Paul M. Clark, being first duly sworn on his oath deposes and says: That he is one of the attorneys for The Northern Colorado Irrigation Company; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

PAUL M. CLARK.

Subscribed and sworn to before me this 25th day of March, A. D. 1912.

My Commission expires June 1st, 1912.

[SEAL.] ARTHUR D. WALL,
Notary Public.

Endorsed thereon: No. 1171. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company, et al. Answer. The Northern Colorado Irrigation Company. Filed March 26th, 1912. P. W. O'Brien, Clerk.

24 And thereafter, and on the second day of April, A. D. 1912, there was filed in the office of the Clerk of the said

Court a certain answer by said defendants which are in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Park, ss:

In the District Court.

No. 1711.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, — of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Answer.

Come now Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, and for separate answer to the complaint herein say*s:*

First. That they admit the allegations contained in paragraphs numbered "First" and "Second" of the complaint.

Second. That as to the truth or falsity of the allegations contained in Paragraph numbered "Third" of the complaint these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Third. That as to the allegations contained in Paragraph numbered "Fourth" of the complaint these defendants say that pursuant to statute there has been heretofore filed and is now on file in the office of the State Engineer a certified copy of a decree of the District Court of Park County entered October 18, 1889, by which is decreed to the O'Neil Ditch Twenty-eight and Eighty-three Hundredths (28.83) cubic feet of water per second of time as of date May 10, 1879, from Tarryall Creek, and that said priority is No. 98 in Water District No. 23, and that so far as these defendants know said
26 decree is in full force and effect.

Fourth. That as to the truth or falsity of the allegations contained in Paragraph numbered "Fifth" of the complaint these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

Fifth. That as to the allegations contained in Paragraph numbered "Sixth" of the complaint, these defendants say that pursuant to statute there has been heretofore filed, and is now on file in the office of the State Engineer a certified copy of a decree of the District Court of Douglas County, Colorado, in Water District No. 8, entered on December 10, 1883, in which it is decreed that The Northern Colorado Irrigation Company's Ditch was entitled to a priority of right of Eleven Hundred and Eighty-four (1184) cubic feet of water per second of time as of January 18, 1879, from the South Platte river

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and its tributaries; that said decree is still in full force and effect. That Tarryall Creek from which plaintiff takes his ditch is a tributary of the South Platte and empties into said Platte above the mouth of defendant The Northern Colorado Irrigation Company's Canal. That said priority as decreed is senior to that of the said O'Neil Ditch as decreed and that in the distribution of water under the decrees these defendants must supply the demands of the said The Northern Colorado Irrigation Company's ditch before supplying those of plaintiff's said O'Neil Ditch. And these defendants deny each and every allegation in Paragraph numbered "Sixth" of the complaint not herein specifically admitted.

Sixth. That as to the allegations contained in Paragraph numbered "Seventh" of the complaint these defendants say that in the distribution of water in Irrigation District No. 1 and the various water districts thereof, they are governed by the priority de-
27 crees as certified to them, and as they appear from the records of the State Engineer's office, and that they distribute the water according to the said decrees and the law and not otherwise and that the alleged grievance complained of in said Paragraph numbered "Seventh" of said complaint consists solely in the said distribution of the water according to the decrees, and that in closing down plaintiff's headgate they were acting according to law and distributing the water according to the relative priorities as decreed, and as they appear upon the records of the State Engineer's office. That these defendants recognize that The Northern Colorado Irrigation Company's priority as decreed is senior to that of plaintiff's said O'Neil Ditch.

Seventh. These defendants deny each and every other allegation contained in Paragraph numbered "Eight" of the complaint.

BENJAMIN E. GRIFFITH, Esq.,
Attorney General of the State of Colorado,
For Defendant Water Officers.

PAUL M. CLARK,
Of Counsel.

STATE OF COLORADO,
City and County of Denver, ss:

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY et al., Defendants.

Alonzo Wright being first duly sworn on his oath deposes
28 and says that he is one of the defendants in the within entitled action; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge.

ALONZO WRIGHT.

Subscribed and sworn to before me this first day of April, A. D. 1912.

My Commission expires June 1st, 1912.

[SEAL.] ARTHUR D. WALL,
Notary Public.

CLOSE IN CENTER

Endorsed thereon: No. 1711. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company, et al., Defendants. Answer Charles W. Comstock, Fillmore Cogswell and Alonzo Wright. Filed April 2nd, 1912. P. W. O'Brien, Clerk, District Court.

29 And thereafter and on the 9th day of April, A. D. 1912, there was filed in the office of the Clerk of the said Court, a certain Replication to the answer herein, in words and figures as follows, to-wit:

30 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Replication.

Comes now the plaintiff and for reply to the separate answer of The Northern Colorado Irrigation Company, defendant herein, says:—

First. The plaintiff admits that the said defendant is the owner of The Northern Colorado Irrigation Company's canal, commonly called the High Line Canal; that the said defendant has a decreed priority for said High Line Canal, as of January 18th, 1879, for eleven hundred and eighty-four (1184) cubic feet of water per second of time, from the South Platte River and its tributaries, but as to the allegation in said answer contained, "that any taking of water from said river by this defendant charged in said complaint was by virtue of its senior right so decreed to it," the plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief. But the plaintiff denies that the said defendant had any right to take the water from said Tarryall Creek and deprive the plaintiff of the use thereof by virtue of its said priority.

As to the allegation in said answer contained "that this
31 defendant has at all time- claimed, and does now claim, that its said priority right so decreed to its ditch is senior to and must be supplied prior to the alleged priority charged to have been decreed to plaintiff's ditch," the plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Second. The plaintiff admits that on the 10th day of December, 1883, in the District Court of Douglas County, Colorado, a decree was made and entered whereby it was ordered, adjudged and decreed, that the said The Northern Colorado Irrigation Company, defendant herein, was entitled to a priority of right to the use of water for irri-

gation purposes, of eleven hundred and eighty-four (1184) cubic feet of water per second of time from the South Platte River, and that said priority was decreed of date of January 18th, 1879, and was priority No. 111, in said Water District No. 8.

And the plaintiff alleges that the aforesaid decree was made and entered in a proceeding instituted and pending in said Court for the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the said water District. That said proceeding was instituted and the said decree therein rendered under and pursuant to certain acts of the Legislature of the State of Colorado, entitled "An act to Regulate the use of Water for Irrigation and Providing for settling the Priority of Right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," Approved February 19, 1879.

Also an Act entitled "An Act to make further provisions for settling the priority of rights to the use of water for irrigation,
32 in the District and Supreme Courts; and for making record of such priorities; and for payment of costs and expenses incident thereto," Approved February 23, 1881.

That plaintiff's ditch, mentioned in the complaint, named and known as the O'Neil Ditch, is located in water District No. 23, and not in Water District No. 8.

That in the said proceedings in the District Court of Douglas County, wherein the decree of December 10th, 1883, mentioned in the answer was rendered, the question concerning priority of appropriation of water between owners of ditches drawing water for irrigation purposes from the South Platte river, and its tributaries in Water District No. 8, and those drawing water from said stream in said water District No. 23, was not heard, adjudicated or settled; and this plaintiff was not a party to said proceeding, had no notice of the same; and this plaintiff never at any time in said proceeding litigated, and had no opportunity to litigate, the matter between himself and the defendant, The Northern Colorado Irrigation Company, as to the relative rights between their said ditches, either as to time of appropriation or quantity of water appropriated.

And the plaintiff denies that the said decree is binding upon him, or that the same is res adjudicata as to him; and denies that the said decree is operative or in effect in Water District No. 23, or against the plaintiff; and denies that the said defendant, The Northern Colorado Irrigation Company, has any right to demand or receive the water appropriated by the plaintiff by and through the O'Neil Ditch, under or by virtue of the said decree, of December 10th, 1883, by the District Court of Douglas County; and the plaintiff denies that the State Engineer, Division Engineer or Water Commissioner, defendants herein, have, by virtue of said decree, any right, power or authority to close down the headgate of
33 his said ditch and deprive him of the water appropriated by him as in his complaint herein alleged, for the purpose of

furnishing the said water to the said defendant, The Northern Colorado Irrigation Company, at any time or under any circumstances, or at all.

And to the allegation in said answer contained, "that this defendant has at all times since its appropriation of January 18, 1879, and also since the entry of said decree, diverted and used the water under said decree in the same manner as at the time complained of in the complaint, and that the said Water Commissioner, Irrigation Division Engineer and State Engineer have at all times given full recognition to said decree of this defendant, and have distributed water to this defendant thereunder," the plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

The plaintiff denies that this cause of action against the defendant herein, has accrued more than four years prior to the bringing of this action; and denies that the said cause of action is barred by limitation of time.

Wherefore the plaintiff prays for judgment as he has already in his complaint herein prayed; and further prays that the said decree of the District Court of Douglas County mentioned in the answer herein be held and decreed to be not binding against the plaintiff, and that the defendant water officials have no power or authority under or by virtue of said decree to close plaintiff's said ditch; and that the defendant The Northern Colorado Irrigation Company take nothing in this action by reason of the said decree.

G. K. HARTENSTEIN,
Attorney for Plaintiff.

34 STATE OF COLORADO,
County of Chaffee, ss:

G. K. Hartenstein, being first duly sworn, upon his oath deposes and says: That he is the Attorney of record for the plaintiff in this action; that he has read the above and foregoing replication and knows the contents thereof and that the same is true of his own knowledge except as to the matters and things therein stated upon information and belief and as to those he believes it to be true; that he makes this verification as attorney for the plaintiff, for the reason that the said plaintiff is absent from the County of Chaffee where this affiant resides.

G. K. HARTENSTEIN.

Subscribed and sworn to before me this 4th day of April, A. D. 1912.

My Commission expires May 11th 1915.

[SEAL.] HARRY L. McGINNIS,
Notary Public.

Endorsed thereon: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al., Defendants. Replication. Filed April 9th, 1912. P. W. O'Brien, Clerk.

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35 And thereafter, and on the 15th day of April A. D. 1912, there was filed with the Clerk of the said District Court, a second and further Replication by the said plaintiff, in words and figures as follows, to-wit:—

36 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Replication.

Comes now the plaintiff and replies to the separate answer of Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, defendants, as follows:

First. That the plaintiff admits the allegations in the "Fifth" paragraph of the separate answer, except that, he denies that the said defendants, in the distribution of water under the decrees, must supply the demands of the said The Northern Colorado Irrigation Company's ditch, before supplying those of plaintiff's said O'Neil Ditch.

Second. Replying to the allegations contained in the Sixth paragraph of the said separate answer, the plaintiff denies that in closing down plaintiff's headgate, the said defendants were acting according to law; and denies that the said defendants have any power or authority, by virtue of any decree, to distribute water in Water District No. 23, or to close down plaintiff's headgate, save
37 and except only in accordance with the said decree of the District Court of Park County, entered October 18th, 1889.

Third. Further replying to the several matters and allegations contained in the "Fifth" and in the "Sixth" paragraphs of the said separate answer, the plaintiff admits that on the 10th day of December, 1883, in the District Court of Douglas County, Colorado, in a proceeding entitled "In the Matter of a Certain Petition for Adjudication of the Priority of Right to the use of Water for Irrigation in Water District No. 8," a decree was made and entered whereby it was ordered, adjudged and decreed that said The Northern Colorado Irrigation Company, defendant herein, was entitled to a priority of right to the use of water for irrigation purposes, of eleven hundred and eighty-four (1184) cubic feet of water per second of time, from the South Platte river, and that said priority was decreed of date of January 18th, 1879, and was priority No. 111, in said Water District No. 8.

CLOSE IN CENTER

But the plaintiff alleges that the aforesaid decree was made and entered in a proceeding instituted and pending in said Court for the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawn water for irrigation purposes from the same stream or its tributaries within the said Water District No. 8.

That said proceeding was instituted and the said decree therein rendered, under and pursuant to certain acts of the General Assembly of the State of Colorado, entitled "An act to regulate the use of water for irrigation and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," Approved February 19, 1879.

38 Also an Act entitled "An act to make further provisions for settling the priority of rights to the use of water for irrigation; in the District and Supreme Courts; and for making record of such priorities; and for the payment of costs and expenses incident thereto," Approved February 23, 1881.

That plaintiff's ditch, mentioned in the complaint, named and known as the O'Neil Ditch, is located in Water District No. 23, and not in Water District No. 8.

That in the said proceeding in the District Court of Douglas County, wherein the decree of December 10th, 1883, mentioned in the separate answer was rendered, the question concerning priority of appropriation of water between owners of ditches drawing water for irrigation purposes from the South Platte river, and its tributaries in Water District No. 8, and those drawing water from said stream in said Water District No. 23, was not heard, adjudicated or settled; and this plaintiff was not a party to said proceeding litigated, and had no opportunity to litigate the matter between himself and the defendant, The Northern Colorado Irrigation Company, either as to time of appropriation or quantity of water appropriated.

The plaintiff further alleges that the said decree by the District Court of Douglas County, referred to in the separate answer herein, confers no right, power or authority, either expressed or implied, upon the said defendants, the State Engineer, the Division Engineer or the Water Commissioner of Water District No. 23, to close down the headgate of the said O'Neil Ditch for the purpose of furnishing to their co-defendant, The Northern Colorado Irrigation Company, any of the water appropriated by the Plaintiff through the said O'Neil Ditch.

That the said decree determines the rights of priority to the use of water for irrigation only between the owners of ditches in

39 Water District No. 8. That the said District Court of Douglas County, in the proceeding in which the said decree was entered, had no jurisdiction of this plaintiff or of his said ditch or water right, and had no jurisdiction of any ditch owners, ditches, or water rights in Water District No. 23, and did not exercise or attempt to exercise jurisdiction over the plaintiff, his said ditch, or water right; and did not exercise or attempt to exercise jurisdiction

over any ditch owners, ditches or water rights in Water District No. 23.

That the relative priorities, either as to time or quantity of water, between the plaintiff's said ditch, and the ditch or canal of The Northern Colorado Irrigation Company, defendant, has never been adjudicated or determined by any tribunal.

That the pretended recognition by these defendants, as alleged in their separate answer, that The Northern Colorado Irrigation Company's, as decreed, is senior to that of plaintiff's said O'Neil Ditch, has no foundation in, and is not authorized by, the said Douglas County decree, and the said decree confers no authority and is no justification for, the acts of the said defendant water officials, complained of in the complaint and admitted in their answer.

Wherefore the plaintiff prays for judgment as he has already in his complaint herein prayed; and further prays that the said decree of the District Court of Douglas County mentioned in the answer herein be held and decreed to be not binding against the plaintiff, and that the defendant water officials have no power or authority under or by virtue of said decree to close the plaintiff's said ditch.

G. K. HARTENSTEIN,
Attorney for Plaintiff.

40 STATE OF COLORADO,
County of Chaffee, ss:

G. K. Hartenstein, being first duly sworn, upon his oath deposes and says: That he is attorney for the plaintiff in the above entitled action; that he has read the foregoing replication and knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true; that he makes this verification as attorney for the plaintiff, for the reason that the plaintiff is absent from the county of Chaffee, where the affiant resides, and for the further reason that the facts are within his knowledge.

G. K. HARTENSTEIN.

Subscribed and sworn to before me this 11 day of April, A. D. 1912.

My Commission expires May 11, 1915.

[SEAL.] HARRY L. McGINNIS,
Notary Public.

Endorsed as follows: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al., Defendants. Replication. Filed April 15, 1912. P. W. O'Brien, Clerk Dist. Court.

41 And thereafter, and on the 16th day of April, A. D. 1912, there was filed in the office of the Clerk of said District Court, a certain demurrer, by the said defendants, in words and figures as follows, to-wit:

42 STATE OF COLORADO,
County of Park, ss:

In the District Court.

No. 1171.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Demurrer.

Comes now the defendant, The Northern Colorado Irrigation Company, and demurrers to the plaintiff's replication filed herein, and for grounds thereof says that said replication fails to state facts sufficient to constitute a reply to this defendant's answer, and sets forth no facts entitling plaintiff to the relief prayed for, or any relief against the defendant.

PAUL M. CLARK,
Attorney for Defendant The Northern Colorado Irrigation Company.

Endorsed thereon as follows: In the District Court. No. 1711. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company, et al., Defendants. Demurrer. Filed April 16th, 1912. P. W. O'Brien, Clerk.

43 And thereafter, and on the 22nd day of May, A. D. 1912, there was filed with the Clerk of the said Court, a further and Additional Replication, in words and figures as follows, that is to say:

44 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Further and Additional Replication.

Comes now the plaintiff, leave of Court first *been* had, and files his further and additional reply to the separate answer of Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, defendants.

And for further and additional reply, the plaintiff alleges:

That he is informed and believes and upon such information and belief alleges, that the said defendants, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, in closing plaintiff's ditch, as alleged and complained of in the complaint, assumed to act and did act, under and pursuant to an Act of the General Assembly of the State of Colorado, entitled "an act concerning irrigation division engineers and other irrigation officials, and repealing all acts in conflict herewith," which act was approved and took effect April 4th 1903.

The plaintiff alleges that the State of Colorado, by the aforesaid act, so far as the same authorizes the defendants to close the plaintiff's said ditch to supply water from the same to the defendant, The Northern Colorado Irrigation Company, under and pursuant to the said decree of the District Court of Douglas
45 County, has deprived and is depriving the said plaintiff — without due process of law, in violation of the Fourth Amendment to the Constitution of the United States.

Wherefore the plaintiff, in addition to his former prayer, prays that the aforesaid act of the General Assembly of the State of Colorado, in so far as it authorizes the Water Officials to close the plaintiff's ditch, or any other ditches, outside Water District No. 8, to supply the priorities in said District No. 8, be held null and void, and for such other, further and general relief as may be just and equitable.

G. K. HARTENSTEIN,
Attorney for Plaintiff.

STATE OF COLORADO,
County of Chaffee, ss:

G. K. Hartenstein, being first duly sworn, upon his oath deposes and says: That he is attorney for the plaintiff in the above en-

titled action; that he has read the foregoing further and additional replication and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and as to these matters he believes it to be true; that he makes this verification as attorney for the plaintiff, for the reason that the plaintiff is absent from the County of Chaffee, where he, the affiant, resides, and for the further reason that the facts are within his knowledge.

G. K. HARTENSTEIN.

Subscribed and sworn to before me this 16th day of May, A. D. 1912.

[SEAL.] HARRY L. McGINNIS,
Notary Public.

My Commission expires May 11, 1915.

46 Endorsed as follows: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company, et al., Defendants. Further and Additional Replication. Filed May 22nd, 1912. P. W. O'Brien, Clerk.

47 And thereafter, and on the same said day, to-wit: the 22nd day of May, A. D. 1912, there was filed with the Clerk of the said Court, a demurrer by the said defendants, in words and figures as follows:

48 STATE OF COLORADO,
County of Park, ss:

In the District Court.

No. 1711.

DAN O'NEIL, Plaintiff,

vs.

CHARLES W. COMSTOCK, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Demurrer.

Come now the defendants, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, and demur to the plaintiff's separate Replication filed herein, and to the additional Replication and for grounds therefor say that said Replication fails to state facts sufficient to constitute a reply to these defendants' answer, and sets

forth no facts entitling plaintiff to the relief prayed for, or any relief against the defendants.

PAUL M. CLARK,
Attorney for Defendants, Charles W. Comstock, Fillmore Cogswell, and Alonzo Wright.

Endorsed thereon as follows: No. 1711. Demurrer. Filed May 22nd, 1912. P. W. O'Brien, Clerk.

49 And thereafter, and on the 29th day of May A. D. 1912, there was filed with the Clerk of the said Court, the Order on Demurrer and Judgment, in words and figures as follows, that is to say:—

50 STATE OF COLORADO,
County of Park, ss:

In the District Court.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Order on Demurrer and Judgment.

On this day, the same being one of the regular juridical days of the May 1912 term of this Court, comes on regularly for hearing the demurrer of the defendant, The Northern Colorado Irrigation Company, to the plaintiff's replication; and also the demurrer of Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, defendants, to plaintiff's replication and his further and additional replication, the plaintiff appearing by G. K. Hartenstein, Esq., his attorney, and the several defendants appearing by Paul M. Clark and Clyde O. Epperson, their attorneys.

The defendants contending that the said replications to their several answers fail to state facts sufficient to entitle the plaintiff to any relief in this action. The plaintiff contending that the Court decree relied upon by the defendants in their several answers and the statutes of the State of Colorado upon the subject of irrigation, under and pursuant to which the said decree was rendered, and the construction by the Supreme Court of the State of Colorado placed upon said statutes and upon similar decrees rendered pursuant to the same, under which the defendants claim to act, and
51 to justify their acts complained of in the plaintiff's complaint herein and against which he seeks relief in this action, deprive him, the plaintiff, of his property without due process of law,

in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court, having heard argument of counsel and being fully advised, finds that the decision of the Supreme Court of the State of Colorado in the case of The Fort Lyon Canal Company et al. vs. The Arkansas Valley Sugar Beet and Irrigated Land Company et al., reported in the 49th Colorado, Supreme Court Reports at page 332, is conclusive upon this Court in this action, and that the plaintiff is not deprived of his property without due process of law. Wherefore the several demurrers of the defendants to the several replications filed by the plaintiff are sustained.

To which finding and ruling of the Court the plaintiff, by his attorney, then and there duly excepts; and elects to stand by his said replications and declines to plead over.

Thereupon, upon motion of the defendants, it is ordered by the Court that judgment be entered dismissing this action.

Wherefore, by reason of the premises, it is considered, ordered and adjudged by the Court, that the plaintiff is not entitled to any relief in this action, and that this action be and the same is hereby dismissed. And it is further ordered and adjudged that the defendants have and recover of and from the plaintiff their costs herein taxed and that execution issue therefor.

To the giving and entering of the said judgment the plaintiff objects and then and there, by his attorney, excepts to the same.

And the plaintiff is granted sixty days from this date within which to prepare and present for the signature and seal of the presiding judge, his bill of exceptions herein.

52 Done in open Court, this 22nd day of May, A. D. 1912.

CHARLES CAVENDER,
District Judge.

Endorsed thereon as follows: No. 1711. In the District Court of Park County, Colorado. Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al., Defendants. Order on Demurrer and Judgment. Filed May 29th, 1912. P. W. O'Brien, Clerk. Recorded in Book "F" at page 579, of the District Court Records.

53 Be it further remembered that afterwards and on the 22nd day of June, A. D. 1912, there was filed in the office of the Clerk of said Court, a certain Bill of exceptions signed and sealed by the Honorable Charles Cavender as acting Judge of the said Court, which bill of exceptions is subjoined hereto and is certified as an original record in said cause together with the hereinbefore recited other portions of the record of said cause in said District Court included in this transcript of the same.

54 STATE OF COLORADO,
County of Park, ss:

In the District Court.

No. 7900.

DAN O'NEIL, Plaintiff,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants.

Plaintiff's Bill of Exceptions.

Be it remembered, That heretofore, to-wit, on Wednesday, the 22d day of May, A. D. 1912, the same being one of the juridical days of the regular May, A. D. 1912, term of said Court, this cause came on for trial upon the issues of law arising upon the demurrers of the several defendants to the replications of the plaintiff, at Fairplay, the County Seat of said County, in said County, District and State, before the Honorable Charles Cavender, District Judge of the Fifth Judicial District of the State of Colorado, sitting for and in behalf of the Honorable Charles A. Wilkin, the regular District Judge of the Eleventh Judicial District; plaintiff appearing by G. K. Hartenstein, Esq., his attorney, and defendants appearing by Paul W. Clark Esq. and Clyde O. Epperson, Esq., their attorneys.

The following proceedings were had in said cause.

55 The defendants contending that the said replications to their several answers, fail to state facts sufficient to entitle the plaintiff to any relief in this action. The plaintiff contending that the Court decree relied upon by the defendants in their several answers and the statutes of the State of Colorado upon the subject of irrigation, under and pursuant to which the said decree was rendered, and the construction by the Supreme Court of the State of Colorado placed upon said statutes and upon similar decrees rendered pursuant to the same, under which the defendants claim to act, and to justify their acts complained of in the plaintiff's complaint herein, and against which he seeks relief in this action, deprive him, the plaintiff, of his property, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The Court, having heard arguments of counsel and being fully advised, finds that the decision of the Supreme Court of the State of Colorado in the case of The Fort Lyon Canal Company et al. vs. The Arkansas Valley Sugar Beet and Irrigated Land Company et al., reported in the 49th Colorado Supreme Court Reports at page 332, is conclusive upon this Court, in this action, and that the plaintiff

is not being deprived of his property without due process of law. Wherefore the several demurrers of the defendants to the several replications filed by the plaintiff, are sustained.

To which finding and ruling of the court the plaintiff, by his attorney, then and there duly excepts; and elects to stand by his said replications and declines to plead over.

Thereupon, upon motion of the defendants, it is ordered by the Court that judgment be entered dismissing this action.

56 Wherefore, by reason of the premises, it is considered, ordered and adjudged by the Court, that the plaintiff is not entitled to any relief in this action, and that this action be and the same is hereby dismissed. And it is further ordered and adjudged that the defendants have and recover of and from the plaintiff their costs herein taxed and that execution issue therefor.

To the giving and entering of the said judgment the plaintiff objects and then and there, by his attorney, excepts to the same; and the plaintiff is granted sixty days from this date within which to prepare and present for the signature and seal of the presiding judge, his bill of exceptions herein.

And now, forasmuch as the matters aforesaid and the objections and exceptions made, taken and reserved, do not fully appear of record, plaintiff presents this, his bill of exceptions reserved by him to the rulings, decisions, findings and judgment of the court in the premises, to the Judge presiding at the trial of said cause, and prays that the same may be signed, sealed and approved by him, and made a part of the record in said cause, as of the date at which said objections and exceptions were made, taken and reserved, in accordance with the statute in such case made and provided.

Which is accordingly done this 19th day of June, A. D. 1912.

(Signed) CHARLES CAVENDER, [SEAL.]
Judge.

57 STATE OF COLORADO,
County of Park, ss:

I, P. W. O'Brien, Clerk of the District Court of the Eleventh Judicial District of the State of Colorado, in and for the County of Park, do certify the above and foregoing to be a true, perfect and complete copy of the Complaint, Summons, Answers, Replications, Demurrers, the Further and additional Replication, the Order on demurrer and judgment and the original Bill of exceptions thereto attached and made a part of this transcript, now on file and of record in said District Court, in a cause there lately pending, In re Dan O'Neil, Plaintiff, vs. The Northern Colorado Irrigation Company et al. Defendants.

Witness my hand and seal of said Court at Fairplay in said County, this 29th day of June, A. D. 1912.

[Seal District Court, Park County, Colorado, 11th Judicial District.]

(Signed) P. W. O'BRIEN,
Clerk of said District Court.

58 In the Supreme Court of the State of Colorado.

No. 7900.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of the State of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, in the State of Colorado, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Error to the District Court of Park County.

Assignment of Errors.

Comes now Dan O'Neil, plaintiff in error herein, by his attorney, and alleges that in the proceedings of this cause in the District Court, prejudicial and manifest error was committed by the Court, and he therefore assigns and specifies, for grounds for the reversal of the judgment herein, the following errors, to-wit:

First. The Court erred in holding that the decision in the case of The Fort Lyon Canal Company et al. vs. The Arkansas Valley Sugar Beet and Irrigated Land Company et al. was conclusive upon the District Court in this action.

Second. The Court erred in holding that the plaintiff was not deprived of his property without due process of law by the acts of the defendants.

Third. The Court erred in sustaining the demurrers, and in sustaining each of them, to the plaintiff's several Replications.

59 Fourth. The Court erred in rendering judgment dismissing this action.

Wherefore, and by reason of the said errors, the plaintiff in error prays this Honorable Court to reverse the said judgment herein and remand the said cause for further proceedings.

(Signed) G. K. HARTENSTEIN,
Attorney for Plaintiff in Error.

60 And afterwards and on, to-wit, the 2nd day of March, A. D. 1914, the same being one of the regular juridical days of the January Term of our said Court, the following further proceedings, inter alia, were had and entered of record, to-wit:

Monday, March Second, A. D. 1914, the Supreme Court of the State of Colorado reconvened at 10 o'clock A. M.

Present:

Hon. Geo. W. Musser, Chief Justice;
" Wm. H. Gabbert,
" S. Harrison White,
" Wm. A. Hill,
" James E. Garrigues,
" Tully Scott,
" M. S. Bailey, Associate Justices;
" Fred Farrar, Attorney General,
Mr. James R. Killian, Clerk,
" Wm. T. Heiskell, Bailiff.

Whereupon the following proceedings were had and done:

61 No. 7900.

DAN O'NEILL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY et al., Defendants in Error.

Error to the District Court of Park County.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of Park County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of the said District Court be, and the same is hereby affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

It is further ordered and adjudged that the said Defendants in Error do have and recover of and from said Plaintiff in Error their costs in this behalf expended, to be taxed, and that execution issue therefor.

And let the opinion of the Court filed herein be published, which said opinion is in words and figures following, to-wit:

62 Filed in Supreme Court Mar. 2, 1914. James R. Killian, Clerk.

No. 7900.

DAN O'NEILL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY et als., Defendants in Error.

Error to the District Court of Park County.

Hon. Charles Cavender, Judge.

Judgment affirmed.

Mr. G. K. Hartenstein, for Plaintiff in Error.
Mr. L. M. Goddard, Mr. L. F. Twitchell, Mr. Paul M. Clark, for Defendants in Error.

Mr. Justice GARRIGUES delivered the opinion of the court.

63 This action was commenced February 21, 1912. The purpose is to settle the relative priorities between ditches situated in different water districts on the South Platte river. The action is in the nature of a suit to quiet title to a water right, and asks injunctive relief restraining the closing of plaintiff's headgate. The South Platte river in Irrigation Division No. 1, is divided into five water districts. Water District No. 23 includes the river from its source in the mountains to the junction of the north and south branches. Water District No. 8 lies immediately below, and includes the river from the junction down to the mouth of Cherry Creek at Denver. The pleadings disclose that plaintiff in error, Dan O'Neill, plaintiff below, is the owner of the O'Neill Ditch, and priority, taking water from Tarryall Creek a tributary of the South Platte, in Water District No. 23; and The Northern Colorado Irrigation Company, defendant below, defendant in error, is the owner of the High Line Canal, and its priority, taking water from the same stream in Water District No. 8. A general adjudication decree under the irrigation statutes of 1879-81 entered December 10, 1883, in the District Court in Douglas County, settled the priorities of all the ditches diverting water for irrigation from the South Platte river in Water District No. 8. This decree awarded the High Line Canal priority No. 111 for 1,184 cubic feet per second dated January 18, 1879. Under the same laws a general adjudication decree entered October 18, 1889, in the District Court in Park County, settled the priorities of the ditches diverting water for irrigation from the same river in Water District No. 23. This decree awarded the O'Neill Ditch priority No. 98 for 28.83 cubic feet per second dated May 10,
64 1879. Neither of these decrees have been appealed from, changed, modified or reversed and are in full force and effect. The official defendants are the State Engineer, Irrigation

Division Engineer of Division No. 1, and the Water Commissioner of District No. 23. Plaintiff's grievance comes from these executive officers delivering the water of the stream in accordance with the decrees of the districts treated as one. The complaint alleges that during the years 1910 and 1911 these officials, upon the demand and at the instigation of the Irrigation Company, closed plaintiff's headgate and demanded that it remain closed, and that the water decreed to his ditch flow down the stream past his headgate into District No. 8 to supply the priority decreed the High Line Canal, for its use and benefit. Defendants admit these acts, and rely and justify the action upon the adjudication decree in Water District No. 8 in Douglas County, and claim that the irrigation statute of 1881 bars plaintiff's right to bring the action. The replication admits the adjudication decrees; but alleges that plaintiff had no notice of, and was not a party to the proceeding in District No. 8 in Douglas County; that the decree, to which he was not a party, in another water district did not authorize the officials to close his ditch in Water District No. 23, for the benefit of defendant's canal; that the District Court of Douglas County, when it entered the adjudication decree, had no jurisdiction over him, his ditch or water rights in District 23; that the relative priorities between the ditches has never been adjudicated; that the officials, in closing his headgate, acted under and pursuant to an Act of the General Assembly concerning Irrigation Division Engineers approved April 4, 1903, but
65 he alleges that the statute in so far as it authorizes the closing of his headgate, and delivering the water to the High Line Canal, deprives him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States. Demurrers were sustained to the replication, plaintiff elected to stand by the pleadings, declined to plead over, and judgment was entered dismissing the action.

2. The 1879-81 irrigation statutes divide the natural streams of the state into units called water districts, and provide for obtaining a general adjudication decree in each district settling the priorities of all the ditches in the district, and create the office of water commissioner in each district, and make it his duty to distribute the water to the ditches of the district according to the decreed priorities. The laws of 1881 divided the state into three water divisions and provided that the water districts of the South Platte river and its tributaries should constitute water Division No. 1.

The laws of 1887 created the office of Superintendent of Irrigation for each water division and make it his duty to see that the water of the division is distributed according to the priorities as established by the decrees in the districts, and provide: if any ditch in any water district in any water division is receiving water whose priority post-dates a ditch in another district in the division as established by the decrees, that he shall shut down the post-dated ditch and deliver the water to the ditch having the senior priority as shown by the decrees, and in this way enforce the priorities of the ditches on the stream according to the decrees of the whole division, treated

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as one decree, without regard to the water district within
66 which the ditch is located. In 1903 the Legislature changed the name of the officer to Irrigation Division Engineer, but his duty as far as this case is concerned, remains the same. Section 34, Irrigation Act of 1881 provides in substance that nothing in the Act or in the final adjudication decree shall prevent any person at any time within four years after the rendering of the decree from bringing, and maintaining any suit or action which theretofore was allowed, to determine any priority. Section 35, provides in substance, that after four years from the time of rendering the final decree, all persons shall be forever barred from setting up any claim or priority adverse or contrary to the decree. These are the sections relied upon by defendant as a bar to plaintiff's action. Section 26, provides in substance that any party to the proceeding feeling aggrieved by the adjudication decree may apply within two years from the time it was entered for a review or reargument; and upon good cause shown, if the court finds the ends of justice will thereby be promoted, it may grant a review or reargument either with or without additional evidence. Section 27 gives any party representing any canal who may feel aggrieved by the decree the right of an appeal from the District Court to the Supreme Court of the state.

3. Plaintiff contends, as we understand, that the Water Commissioner in District 23 should distribute the water to the ditches according to the decree of the district irrespective of the decrees in other districts; that the decree in District 8 when entered did not affect his canal which was outside of the district in which it was entered; that there was no legislative authority for giving the decree in
67 District 8 any force or effect outside of the water district in which it was entered prior to the Irrigation Division Engineer's Act of 1887 as amended in 1903; that the Legislature could not by a subsequent act make the decree binding upon him in another water district by which he was not bound when it was entered; that the Douglas County decree in this case was entered in 1883, and the statute passed in 1887, which, in so far as it gives the decree extra territorial force, is retroactive; that prior to the Act of 1887 there was no law requiring plaintiff in Water District No. 23 to take notice of the decree in Water District No. 8; that the Act of 1887 was passed for the purpose of giving decrees theretofore entered, force and effect in other water districts, and to that extent placed a burden and obligation that did not before exist, upon plaintiff in Water District No. 23; that the persons barred by the four-year limit, (Sections 34 and 35, Irrigation Laws 1881) are those setting up claims in the water district contrary to the decree, and not the persons with adverse claims in another water district; that it was the enforcement of the law of 1887 by the Division Engineer that made the four-year bar applicable to plaintiff's action in District 23; that if the Act of 1887 is eliminated, the foundation for the Fort Lyon case in the 39th Colorado is removed; that the decree in Water District No. 8 was not binding when entered, on plaintiff in Water District No. 23, but more than three years after entering it the Legislature passed the 1887 law which under the construction given the

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irrigation statutes in the Fort Lyon case authorized the executive officers to summarily take plaintiff's appropriated water and turn it over to the defendant, thus depriving him of his property without due process of law.

4. In the Fort Lyon Canal case, 39 Colo., 332, the Fort
68 Lyon Canal is in Water District No. 17 and the Amity Canal is in Water District 67, both on the Arkansas river in Water Division No. 2. A general adjudication decree entered June 3, 1895 settled the priorities of all the ditches in District 17 and a like decree entered July 1, 1895 settled the priorities of all the ditches in 67. September 24, 1901, more than four years after entering the decrees, the Fort Lyon Canal Company, owner of the Fort Lyon Canal, brought an independent action against the owner of the Amity to establish the relative priority of the Fort Lyon Canal in District 17 as against the priority of the Amity in District 67. The question before this court was whether the relative rights of canals in different water districts on the same stream in the same division could be determined in an independent action in a suit brought for that purpose after four years from entering the adjudication decree in the water district. When, if ever, do the decrees in the different water districts of a division on the same stream cease to be prima facie evidence of the priorities and become conclusive upon all ditches in the different districts? This court said the answer to the question depended upon the construction of the four-year limitation statutes, sections 34 and 35 of the Irrigation Laws of 1881. In construing the Act, we held that Sections 26 and 27 providing for a review, reargument or appeal applied to and were intended for the benefit of ditch owners who were parties to the proceeding in the district; that the decree settling the priorities of the ditches in the district, as to the parties, was res judicata and could only be directly attacked, reviewed or modified, by a party, in the manner provided in Sections 26 and 27, and that a claimant representing a ditch
69 in an adjudication proceeding could not maintain an independent action against another claimant representing a ditch in the same proceeding, for the purpose of establishing a right different from that settled by the decree, for the reason that the proceeding as to all the parties is res judicata and can not be collaterally attacked, but that the decree is not res judicata as to, and could be collaterally attacked by those owning ditches or water rights in other water districts, if commenced within the prescribed time; that such persons could within the time limited commence an independent action for the purpose of determining the relative priorities of canals in different water districts. That Sections 34 and 35 apply to and were intended for the benefit of ditch and water right owners in water districts other than the one in which the decree was entered, and fixed the limit of time within which such persons will be permitted to commence an independent action for the purpose of settling the relative priorities of ditches in different water districts, but that after such time had expired, the decrees became conclusive. The court, in the Fort Lyon case, holds squarely that the four-year limitation statutes, Sections 34 and 35, apply and relate to the representative

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of ditches in different water districts than the one in which the decree was entered, and are for their benefit; but that after four years from entering the decree in the different water districts they becom conclusive upon everyone, and bar the commencement of an independent action brought to determine the relative priorities of ditches in different districts.

In the case at bar the adjudication decree in Water District No. 8 settling the priority of the High Line Canal was entered
70 December 10, 1883. This independent action brought by the owner of the O'Neill Ditch in District 23 was commenced February 21, 1912, and by the construction placed upon the statute in the Fort Lyon case is barred. An attempt is made to distinguish this from the Fort Lyon case because the statute of 1887 providing in effect that the executive officer of the Water Division in distributing the water shall treat the decrees of the different districts as one decree, was passed long before the decrees in the Fort Lyon Case were entered, and the opinion in that case said the owners took their priorities as settled by the decrees with this provision of the law attached to them, whereas in this case the decree of the High Line Canal was entered long before the Act of 1887 was passed, therefore that provision of the law with regard to treating the different decrees as one could not attach to this decree when it was entered. We do not see how this makes any difference. If the construction placed upon the four-year-limit, Act of 1881, in the Fort Lyon case is correct, of which we have no doubt, then any action that plaintiff might bring to determine the relative priorities of the canals after four years from entering the decree was barred, regardless of the 1887 statute. If the 1887 statute had never been enacted, plaintiff's action would have been barred just the same, and the passage of the statute as far as the bar to this action is concerned made no difference.

Judgment affirmed.

Decision en banc.

71 And afterwards and on, to-wit, the 21st day of December, A. D. 1914, the following original assignments of error were filed in our said Supreme Court, together with the following original petition for a writ of error to the Supreme Court of the United States, and the allowance of said writ was duly endorsed thereon:

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72 In the Supreme Court of the United States, October Term, 1914.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Assignment of Errors.

And now, on this 21st day of December, A. D., 1914, comes the plaintiff, by his attorneys, G. K. Hartenstein, Charles D. Hayt and Clyde C. Dawson, and says that the judgment entered in the above cause, on the 2d day of March, A. D., 1914, is erroneous, and unjust to the plaintiff:

First. Because the said judgment deprives the plaintiff of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States, by adjudging the plaintiff bound by a decree in a proceeding to which he was not a party and of which he had no notice.

Second. Because the judgment of the Supreme Court of the State of Colorado affirming the judgment of the District Court, in this cause, makes binding upon the plaintiff a decree in a proceeding to which he was not a party, of which he had no notice and from which he was barred by the statute under which said proceeding was commenced, prosecuted, and the said decree entered, and which
73 deprived the plaintiff of his property without due process of law, in violation of the provisions of the fourteenth amendment to the Constitution of the United States.

Third. Because the Court adjudged that the plaintiff's action is barred by sections 34 and 35 of the irrigation law of 1881, of the State of Colorado, said law being an Act approved and in effect on February 23d, 1881, the title of which is recited in the plaintiff's several replications in this action, and which is as follows:

"An act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and Supreme Courts, and for making record of such priorities and for payment of costs and expenses incident thereto", thereby depriving the plaintiff of his day in Court and preventing him from adjudicating his right and title to the property involved in this action, as against the right of the defendant The Northern Colorado Irrigation Company, claiming the same property, and depriving the plaintiff of his said property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

Fourth. Because the irrigation statutes of the State of Colorado, of 1879 and 1881, the titles of which are set out in the plaintiff's several replications in this action, and are as follows:

"An act to regulate the use of water for irrigation and providing

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for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use", approved February 19th, 1879, and

"An act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and Supreme Courts, and for making record of such priorities, and for payment of costs and expenses incident thereto",

74 approved February 23d, 1881, and especially sections 34 and 35 of the said act of 1881, deprive the plaintiff of his property, involved in this action, without due process of law, by preventing him from having his right and title to said property determined and adjudicated according to the law of the land.

Fifth. Because the Statute of the State of Colorado entitled "An act concerning irrigation division engineers and other irrigation officials, and repealing all other acts in conflict herewith", which act was approved and took effect April 4th, 1903, and under which act the defendant officers Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, acted, in closing the plaintiff's ditch, and in delivering to The Northern Colorado Irrigation Company, the other defendant, the water claimed by the plaintiff and involved in this action, in so far as the same authorizes and empowers the said defendant officials to close the plaintiff's ditch in order to supply water to the defendant, The Northern Colorado Irrigation Company, under and pursuant to a decree in a proceeding to which the plaintiff was not a party and of which he had no notice, deprives the plaintiff of his property without due process of law, and is in conflict with and in violation of the fourteenth amendment to the Constitution of the United States, which statute, by the judgment of the Court, remains operative and effective, and permits and authorizes the defendant water officials to take the water claimed by the plaintiff out of his ditch, and to deliver the same to The Northern Colorado Irrigation Company, defendant, without any judicial determination of the rights of the said parties to *to* said water, and without an opportunity for such an judicial determination.

Sixth. Because the act of the General Assembly of the State of Colorado, entitled

"An act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and

75 Supreme Courts, and for making record of such priorities and for payment of costs and expenses incident thereto", approved and in effect February 23d, 1881, and especially sections 34 and 35 of said act, as construed, applied and enforced in this action, by the Supreme Court of the State of Colorado, deprived the plaintiff of his property without due process of law in violation of the provisions of the fourteenth amendment to the Constitution of the United States:

CHARLES D. HAYT,
CLYDE C. DAWSON,
G. K. HARTENSTEIN,
Solicitors and Attorneys for Plaintiff.

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76 [Endorsed:] No. —. In the Supreme Court of the United States. Dan O'Neil, Plaintiff in Error, vs. The Northern Colorado Irrigation Company, et al., Defendants in Error. Assignment of Errors. Filed in the Supreme Court of the State of Colorado Dec. 21 1914. James R. Killian, Clerk.

77 In the Supreme Court of the United States, October Term, 1914.

DAN O'NEILL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Petition for Writ of Error.

To the Honorable George Musser, Chief Justice of the Supreme Court of the State of Colorado:

Now comes Dan O'Neill, plaintiff in error in the above cause, and shows unto your honor that in the record and proceedings and rendition of the judgment in the above cause, by the Supreme Court of the State of Colorado, it being the highest Court of said State in which a decision could be had on the said suit between Dan O'Neill and said the Northern Colorado Irrigation Company, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, manifest error has occurred, greatly to his damage, whereby petitioner feels ag-rieved.

That in the records and proceedings it will appear that there was drawn in question the validity of statutes of the State of Colorado, and an authority exercised under said State pursuant to such statutes, and pursuant to the construction placed upon said statutes by the Supreme Court of said State, on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity of the law of the state and of the au-

78 thority exercised by the State under said law; all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that this writ be allowed and that a transcript of the reocrd, proceedings and papers upon which said order was made and judgment rendered, duly authenticated, be ordered to be sent to the Supreme Court of the United States, at Washington, D. C. under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

CHARLES D. HAYT,
CLYDE C. DAWSON,
G. K. HARTENSTEIN,
Solicitors and of Counsel.

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Let the writ of error issue.

GEORGE W. MUSSER,
Chief Justice Supreme Court of Colorado.

79 [Endorsed:] No. —. In the Supreme Court of the United States. Dan O'Neil, Plaintiff in Error, vs. The Northern Colorado Irrigation Company et al., Defendants in Error. Petition for Writ of Error. Filed in the Supreme Court of the State of Colorado, Dec. 21, 1914. James R. Killian, Clerk.

80 And further, and on, to-wit, the 21st day of December, A. D. 1914, there was filed in our said Court a certain appeal bond on error, which is in words and figures following, to-wit:

81 DAN O'NEILL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Filmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Appeal Bond on Error.

Know all men by these presents, that we, Dan O'Neill, as principal, and G. M. Ohler, Alfred T. Edmondson, A. S. Turner, South Park Land & Live St. Co., Harold Chalmers, H. James, A. R. Buckley, A. H. Lilly, Eli E. Portis, and W. R. Milligan, sureties, acknowledge ourselves to be jointly indebted to The Northern Colorado Irrigation Company, a corporation, Charles W. Comstock, as State Engineer of Colorado, Filmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, and Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, defendants in error in the above cause, in the sum of one thousand (1,000) dollars, conditioned that, whereas, on the second day of March, A. D. 1914, in the Supreme Court of the State of Colorado, in a suit pending in that Court, wherein Dan O'Neill was plaintiff and The Northern Colorado Irrigation Company, a corporation, Charles W. Comstock, as State Engineer of Colorado, Filmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1, Alonzo Wright, as Water Commissioner of Water District No. 23, in the
82 State of Colorado, were defendants, numbered on the docket of said Court as 7900, a judgment was rendered against the said Dan O'Neill, and the said Dan O'Neill having obtained a writ of error from the Supreme Court of the United States, and having filed said writ of error in the office of the Clerk of the Supreme Court of the State of Colorado, to reverse the said judgment, and a citation directed to the said defendants in error, citing and admonishing them to be and appear before the Supreme Court of the United States, in the City of Washington, D. C. on the 25th day of January, A. D. 1915,

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Now, if the said Dan O'Neill shall prosecute his said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) DAN O'NEILL.
G. M. OHLER.
ALFRED T. EDMONDSON.
A. S. TURNER.
SOUTH PARK LAND & LIVE ST. CO.
HAROLD CHALMERS.
H. JAMES.
A. R. BUCKLEY.
A. H. LILLY.
ELI E. PORTIS.
W. R. MILLIGAN.

Approved this 21st day of December, A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

(Endorsed:) No. —. Dan O'Neill, Plaintiff in Error, vs. The Northern Colorado Irrigation Company, et al., Defendants in Error. Appeal Bond on error from the Supreme Court of the United States to the Supreme Court of Colorado. Filed in the Supreme Court of the State of Colorado, Dec. 21, 1914. James R. Killian, Clerk.

83 And further, and on, to-wit, the 26th day of December, A. D. 1914, the following original writ of error was filed in our said Court:

84 In the Supreme Court of the United States.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Writ of Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Court before you, between Dan O'Neil, Plaintiff in Error, and the Northern Colorado Irrigation Company, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, Defendants in Error, your Court being the highest Court of

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said State having jurisdiction to render judgment in the case; there was drawn in question the validity of statutes of the State of Colorado, and an authority exercised under said State pursuant to such statutes, and pursuant to the construction placed upon said statutes by your said Court, on the ground of repugnancy to the constitution of the United States, and the decision was in favor of the validity of the law of the State and of the authority exercised by
85 the State under said law, and there being manifest error in said decision greatly to the damage of Dan O'Neil, the petitioner in error, and we being willing that, if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 25th day of January, A. D., 1915, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 26th day of December, in the year of our Lord, A. D., 1914, and of the Independence of the United States the 139th year, at Denver in the District of Colorado.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP, *Clerk.*

86 [Endorsed:] No. —. In the Supreme Court of the United States. Dan O'Neil, Plaintiff in Error, vs. The Northern Colorado Irrigation Company, et al., Defendants in Error. Writ of Error. Filed in the Supreme Court of the State of Colorado, Dec. 26, 1914. James R. Killian, Clerk.

87 Supreme Court of the State of Colorado.

I, James R. Killian, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk, on December 26, 1914, in the matter of Dan O'Neill vs. The Northern Colorado Irrigation Company et al., the original bond, of which a copy is herein set forth, and the original writ of error as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Denver, Colorado, this 18 day of February, A. D. 1915.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of Colorado.

88 And afterwards, and on, to-wit, December 26th, A. D. 1914, there was filed in our said Court an original citation with service, which is in words and figures as follows, to-wit:

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89 In the Supreme Court of the United States, October Term, 1914.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Citation.

The President of the United States to the above named defendants in error, Greeting:

You and each of you are hereby notified and admonished to be and appear before the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the 25th day of January A. D. 1915, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Colorado, wherein Dan O'Neil is plaintiff and you are defendants, that you may answer why the judgment rendered against Dan O'Neil, the plaintiff in error, may not be revised and justice done in the premises.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 26th day of December A. D. 1914.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of the State of Colorado.

90 [Endorsed:] No. —. In the Supreme Court of the United States. Dan O'Neil, Plaintiff in Error, vs. The Northern Colorado Irrigation Company, et al., Defendants in Error. Citation. Dec. 26" 1914. Received copy of the within this day 4 P. M. and service accepted. L. F. Twitchell, by H. R. Kaus. L. M. Goddard, Paul M. Clark, Fred Farrar, Attorney General, by Francis E. Bouck, Deputy Attorney General, Solicitors and Attorneys for Defendants in Error. Filed in the Supreme Court of the State of Colorado Dec. 26, 1914. James R. Killian, Clerk.

91 And afterwards, and on, to-wit, January 5th, A. D. 1915, there was filed in said cause an original præcipe, in words and figures as follows, to-wit:

Filed in the Supreme Court of the State of Colorado Jan. 5, 1915. James R. Killian, Clerk.

In the Supreme Court of the United States, October Term, 1914.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Fillmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Præcipe for Transcript of Record on Writ of Error from the United States Supreme Court.

In accordance with Rule 8 of the Supreme Court of the United States, Dan O'Neil, Plaintiff in Error in the said Court, Appellee in the Supreme Court of the State of Colorado, files this his præcipe, indicating the record to be incorporated in the transcript thereof for consideration by the Supreme Court of the United States on said writ of error, to-wit:

1. Complete record of the trial court, including final judgment, bill of exceptions, appeal orders and appeal bond.

2. Complete record of the Supreme Court of Colorado, including assignment of errors and all proceedings in the Supreme Court including opinion of the Court and final judgment.

3 3. All proceedings in the Supreme Court of Colorado subsequent to final judgment, including assignment of errors, petition, bond, writ of error, citation and all orders and other proceedings relating to said writ of error from the Supreme Court of the United States to said Supreme Court of Colorado, including also this præcipe.

G. K. HARTENSTEIN,
CHARLES D. HAYT,
CLYDE C. DAWSON,
Attorneys for Dan O'Neill, Plaintiff in Error in the Supreme Court of the United States.

4 The undersigned, attorneys and of counsel for the Defendants in Error in the Supreme Court of Colorado, who are Defendants in Error in the Supreme Court of the United States, acknowledge service of a copy of the foregoing præcipe this 4th day of January, A. D., 1915, and hereby stipulate that the matters and things therein designated will constitute a complete transcript of the entire record and proceedings of the trial court, upon which the cause was determined by the Supreme Court of Colorado, and also a complete transcript of the entire record of said Supreme Court of Colorado, including all of the evidence offered, received or considered in either of said courts in arriving at the final determination

of said cause; and do further stipulate that the same shall constitute the transcript of the record to be transmitted to the Supreme Court of the United States in said writ of error.

L. F. TWITCHELL,
By H. R. KAUS,
PAUL M. CLARK,
L. M. GODDARD,
FRED FARRAR,
Attorney General,
Attorneys for Defendants in Error in the Supreme Court of the United States.

95 [Endorsed:] In the Supreme Court of the United States. October Term 1914. Dan O'Neil, Plaintiff in Error, vs. The Northern Colorado Irrigation Company, et al., Defendants in Error. Præcipe for Transcript of Record on Writ of Error from the United States Supreme Court.

96 And further, and on to-wit, January 25th, A. D. 1915, there was filed in our said Court an application for extension of time, which together with the order thereon, is in words and figures as follows, to-wit:

97 Filed in the Supreme Court of the State of Colorado Jan 25, 1915. James R. Killian, Clerk.

In the Supreme Court of the United States, October Term, 1914.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Filmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Application for Extension of Time in Which to Complete Transcript of Record.

To Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado:

In accordance with Rule 8 of the Supreme Court of the United States, Dan O'Neil, plaintiff in error in the said court, appellee in the Supreme Court of the State of Colorado, having heretofore filed his præcipe indicating the record to be incorporated in the transcript thereof, for consideration by the Supreme Court of the United States on writ of error, which said transcript under the original order made herein should be completed on the 25th day of January, A. D. 1915, but because of lack of clerical and stenographic assistance in my office the same has not as yet and cannot be completed on time;

98 Your applicant, therefore, respectfully represents that the additional time herein below stated will be required in which to prepare the transcript herein in accordance with said præcipe, and requests that an extension of said time therefor be granted from said date, January 25th, A. D. 1915, until and including the 10th day of March, A. D. 1915.

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

99 Filed in the Supreme Court of the State of Colorado, Jan. 25, 1915. James R. Killian, Clerk.

In the Supreme Court of the United States, October Term, 1914.

DAN O'NEIL, Plaintiff in Error,
vs.
THE NORTHERN COLORADO IRRIGATION COMPANY, a Corporation; Charles W. Comstock, as State Engineer of Colorado; Filmore Cogswell, as Irrigation Division Engineer of Irrigation Division No. 1; Alonzo Wright, as Water Commissioner of Water District No. 23, in the State of Colorado, Defendants in Error.

Affidavit.

James R. Killian, first being duly sworn on his oath, says: that he is the Clerk of the Supreme Court of the State of Colorado; that it has become necessary for him as such Clerk to prepare an application to the Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado, requesting that the time for the preparation of the transcript of the record in the above entitled cause be extended from January 25th, A. D. 1915, to an- including March 10th, A. D. 1915; that the contents of said application are true of his own knowledge. Affiant further states that he cannot get out said transcript on time, in accordance with the præcipe filed herein, on account of lack of clerical and stenographic assistance in his office; that the additional time requested in said appliation, namely, up to and including March 10th, A. D. 1915, will be necessary for affiant to comply fully with the requirements of said præcipe in the preparation of such transcript of record herein.

JAMES R. KILLIAN.

Subscribed and sworn to before me the 25th day of January, A. D. 1915.

M. S. BAILEY, [SEAL.]
Supreme Court Judge, State of Colorado.

100 Ordered, on consideration of the foregoing affidavit and application and for good cause shown, that the time for prepa-

ration of said transcript be and the same is hereby extended to March 10th, 1915.

Dated at Denver, Colorado, this January 25th, 1915.

WILLIAM H. GABBERT,
Chief Justice, Supreme Court of Colorado.

Filed in the Supreme Court of the State of Colorado Jan. 25, 1915. James R. Killian, Clerk.

101 Supreme Court of the State of Colorado.

I, James R. Killian, Clerk of said Court, do hereby certify that the foregoing pages numbered from 1 to 100, inclusive, are a true, full and complete transcript of the proceedings in the case of Dan O'Neill, Plaintiff in Error, vs. The Northern Colorado Irrigation Company et al., Defendants in Error, and also of the opinion of the Court rendered therein, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Denver, State of Colorado, this 18 day of February, A. D. 1915.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

102 UNITED STATES OF AMERICA,
Supreme Court of Colorado:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of the State of Colorado, in the City of Denver, this 18 day of February, A. D. 1915.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

Cost of this transcript, $15.00. Paid by Plaintiff in Error.

Endorsed on cover: File No. 24,573. Colorado Supreme Court. Term No. 360. Dan O'Neil, plaintiff in error, vs. The Northern Colorado Irrigation Company et al. Filed February 24th, 1915. File No. 24,573.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 68.

DAN O'NEIL, PLAINTIFF IN ERROR,

vs.

THE NORTHERN COLORADO IRRIGATION COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN REPLY.

CHARLES D. HAYT,
CLYDE C. DAWSON,
FRED R. WRIGHT,
Solicitors for Plaintiff in Error.

G. K. HARTENSTEIN,
Of Counsel.

(24,573)

(24,573)

IN THE

SUPREME COURT OF THE UNITED STATES.

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DAN O'NEIL, PLAINTIFF IN ERROR,

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THE NORTHERN COLORADO IRRIGATION COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

REPLY BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

I.

Colorado Cases on the Construction of the Adjudication Acts.

Counsel for defendant in error say in their brief, that previous to the case of *Fort Lyon Canal Co. vs. Arkansas Valley Co.*, 39 Colo., 332, the Supreme Court of Colorado had not passed upon the effect of sections 34 and 35 of the act of 1881 (these being the limitation sections), so far as the rights of parties outside of the district where the decree was rendered is concerned. Counsel, however, appear to

have overlooked the case of *Nichols vs. McIntosh*, 19 Colo., 22. Nichols was a ditch owner in a district in which a decree was rendered in 1882. He had filed his statement of claim, as required by section 1 of the act of 1881 (brief of plaintiff in error, p. 13), and so was entitled to personal service under section 8 of the same act (brief of plaintiff in error, p. 18), when an adjudication proceeding was started. He was out of the State at the time of the proceeding, and so was never served. A number of years later he brought an action against the water commissioner to enforce his priority, which he claimed was of 1859. It was urged that the decree of 1882 was *res adjudicata* as to him. The Supreme Court of Colorado held that it was not, and that Nichols was not bound by the decree, nor by either the two or four-year statute of limitations.

Nichols vs. McIntosh, 19 Colo., 22, 26-28.

Of necessity, if a ditch owner in the district who was not a party to the adjudication was not cut off by the four-year statute of limitations, a ditch owner outside of the district who was not a party could not have been made a party, and could not have intervened, would not be affected by the four-year statute of limitations.

Defendants in error further claim that if the four-year statute does not apply to parties outside of the water district, it cannot apply to any one, since every owner in the district is bound by actual or constructive notice. But the case above cited shows that this is not correct, for the constructive notice given by the advertisement does not bind those who should have had personal service. Moreover, the Colorado Supreme Court has held in several cases that there are instances where a ditch owner *in the district* is entitled to the benefit of the four-year statute and is not bound by the two-year statute.

Crippen vs. The X. Y. Irrigating Ditch Co., 32 Colo., 447.

Broad Run Investment Co. vs. Deuel and Snyder Improvement Co., 47 Colo., 573, 579-80.

From the three cases cited above, it will be seen that both the two and four-year statute of limitations applied to parties within the water district where the adjudication was held, and that never until the case of *Fort Lyon Canal Co. vs. Arkansas Valley Co.*, 39 Colo., 332, had the four-year statute been extended to water users in another district, and, furthermore, that the case of *Nichols vs. McIntosh* (*supra*) was a direct adjudication that neither statute applied to any one but a party to the action.

II.

Cases from This Court.

None of the cases from this court cited by defendant in error are applicable here. They are mostly cases of actions *in rem*, where constructive service was upheld, as in the California "burnt-record" case, *American Land Co. vs. Zeiss*, 219 U. S., 47, or cases dealing with the recording acts, such as *Vance vs. Vance*, 108 U. S., 514. In all of them notice and an opportunity to act were given, by constructive service, statute, or some other manner. In no case was a decree which did not bind a person who had no notice of it made effective against him by the statute of limitations. The case upon which the Colorado Supreme Court chiefly relied, the case of *Barker vs. Harvey*, 181 U. S., 481, also cited by defendants in error, is similar to the other cases. It is one of a long series of cases holding that the Federal Government, on taking over territory from another power, may by act of Congress require all persons claiming under grants from such power to submit their claims to a court or other body for confirmation. This was said by this court to be a constitutional method of separating public from private lands. Here again was notice and an opportunity to act before the statute attached.

The principle of these cases seems similar to that of the recording act cases. In addition, it may be said that where

the question of title is one directly between the sovereign and a private party, the sovereign may have the right to compel the private party to take the onus of proving his claim, even though in undisturbed possession of the property.

III.

Resume of Contentions of Plaintiff in Error.

For the convenience of the court we present a brief résumé of our contentions:

1.

The rule established by the case of *Nichols vs. McIntosh* and other early decisions, was a rule of property, and in spite of the change of attitude on the part of the Supreme Court of Colorado, should be followed by this court, and a departure from said rule by the Colorado court is a violation of the plaintiff's rights under the Fourteenth Amendment to the Federal Constitution.

Gelpcke vs. Dubuque, 1 Wall., 222; 17 L. Ed., 520, 525-6.

2.

In any event, the four-year statute of limitations as now construed by the Supreme Court of Colorado is a violation of the Fourteenth Amendment to the Constitution of the United States, because:

1. It makes binding upon plaintiff a decree to which he was not a party, and of which he had no notice, and no opportunity to defend;

2. It sets the statute of limitations running upon a decree which is absolutely void as to him, and void as to everyone, if his rights are necessarily affected by its enforcement.

New Orleans Water Co. vs. New Orleans, 164 U. S., 471, 480-1.

Greeley vs. Lowe, 155 U. S., 58, 62-3.

California vs. Southern Pacific Co., 157 U. S., 229, 248-57.

Archuleta vs. Archuleta, 52 Colo., 601, 608-9.

A statute of limitation cannot be set in motion by a decree of this kind (brief of plaintiff in error, pp. 43-44).

3. It sets the statute running upon a decree which does not affect the rights of the plaintiff in error legally so as to give him a cause of action, and in this case the statute had run before his cause of action accrued.

4. It sets the statute running for a decree which not only did not affect his legal rights, but of which he had no notice.

5. It sets the statute running against the plaintiff in error, although he was then in undisturbed possession of his property (brief of plaintiff in error, pp. 41-42).

3.

The act of 1887 as modified in 1903 is also unconstitutional because it attempts to enforce against plaintiff in error a decree to which he was not a party, of which he had no notice, and which is void as to him.

Respectfully submitted.

CHARLES D. HAYT,
CLYDE C. DAWSON,
FRED R. WRIGHT,
Solicitors for Plaintiff in Error.

G. K. HARTENSTEIN,
Of Counsel.

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(24,573.)

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 68.

DAN O'NEIL, PLAINTIFF IN ERROR,

VS.

THE NORTHERN COLORADO IRRIGATION COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The parties occupy the same positions as in the state courts. The action is in the nature of a suit to quiet title to a water-right, and injunctive relief is demanded, restraining the defendants from closing plaintiff's irrigating ditch. The irrigated lands in Colorado are divided into districts; these districts

were first designated as "irrigation districts;" later they were designated and are now known as "water districts." Each district has a water commissioner, appointed by the governor, and his duties are defined by the statute hereinafter quoted. The water districts involved in this action are Nos. 8 and 23. The plaintiff's ditch is located in District No. 23, and the commissioner of that district is made a defendant. The state is also divided into irrigation divisions. Each division comprises the territory irrigated from a specified river or rivers. These divisions were first designated "water divisions." The ditches involved in this action are located in Division No. 1, which is comprised of lands irrigated from the South Platte River and other streams. Each division has an officer known as Irrigation Division Engineer. This officer was originally designated superintendent of irrigation. The division engineer has supervisory power over the water commissioners in his division, as well as the administration and distribution of the water, and for that reason the division engineer is made a party defendant.

The state engineer has general supervising control over the public water of the state and has general charge of the work of the division engineers and water commissioners and is for that reason made a defendant.

These defendants will be designated as "water officials" in this brief.

The Northern Colorado Irrigation Company, the principal defendant, is the owner of The High Line Canal, located in Water District No. 8, which is supplied with water from the South Platte River, and below the tributary, Tarryall Creek, which supplies

plaintiff's ditch, known as the O'Neil Ditch, which is located in Water District No. 23. Priorities in District No. 23 were adjudicated by the District Court of Park County, and the plaintiff's ditch was awarded a priority numbered 98, in Water District 23, for 28.83 cubic feet of water per second of time, as of May 10th, 1879, by a decree entered October, 1889.

Priorities in District No. 8 were adjudicated by the District Court of Douglas County, and by a decree of that court the High Line Canal was, on December 10th, 1883, awarded a priority for 1,184 cubic feet of water per second of time as of date January 18th, 1879, and is Priority 111 in District No. 8.

During the years 1910 and 1911, the defendant water officials, upon demand of the Irrigation Company, defendant, closed the plaintiff's ditch and turned the water from his ditch down stream to supply the ditch of the Irrigation Company, defendant. The plaintiff commenced this action February 21st, 1912. The water officials filed a joint answer, justifying their action in closing plaintiff's ditch under the decree in Water District No. 8. The Irrigation Company filed a separate answer by which it claims a right prior to the plaintiff in the waters of Tarryall Creek by reason of the Douglas County decree in District No. 8.

To these several answers the plaintiff filed his reply, admitting the Douglas County decree; alleging that the said decree was rendered in a proceeding to adjudicate priorities to the use of water in Water District No. 8, pursuant to the irrigation statutes of 1879 and 1881. That the plaintiff was not a party to said proceeding, had no notice of the same; that the decree in District No. 8 did not authorize the

water officials to close plaintiff's ditch, or any ditch in Water District No. 23. That the District Court of Douglas County had no jurisdiction in said proceeding, either of the plaintiff, his ditch or water right. That the relative priorities, either as to time or quantity of water, between plaintiff's ditch and the irrigation company's canal, has never been adjudicated or determined by any tribunal.

The plaintiff made further reply to the answer of the water officials, as follows:

> "That he is informed and believes, and, upon such information and belief, alleges that the said defendants, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, in closing plaintiff's ditch, as alleged and complained of in the complaint, assumed to act and did act, under and pursuant to an Act of the General Assembly of the State of Colorado entitled, 'AN ACT CONCERNING IRRIGATION DIVISION ENGINEERS AND OTHER IRRIGATION OFFICIALS, AND REPEALING ALL ACTS IN CONFLICT HEREWITH,' which act was approved and took effect April 4, 1903.
>
> The plaintiff alleges that the State of Colorado, by the aforesaid act, so far as the same authorizes the defendants to close the plaintiff's said ditch to supply water from the same to the defendant, The Northern Colorado Irrigation Company, under and pursuant to the said decree of the District Court of Douglas County, has deprived and is depriving the plaintiff of property without due

process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

The defendants filed general demurrers to the replications, which were sustained.

The plaintiff elected to stand by his replications and declined to plead over. Judgment was entered dismissing the action. The defendants do not rely upon the fact that the High Line Canal has a right prior to the O'Neil ditch, by reason of a prior diversion and application, but rely and justify their acts complained of solely upon the Douglas County decree.

The defendants also pleaded the four-year limitation statute, contained in the act of 1881, as to the decree in Water District No. 8, and that the matters determined by said decree are *res adjudicata.*

The Colorado Supreme Court held that the plaintiff's right of action is barred by the four-year limit act of 1881 (Sections 34 and 35), Record, pages 29-33.

The limitation sections are hereinafter set out.

II.

SPECIFICATION OF ERRORS.

First: Because the said judgment deprived the plaintiff of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by adjudging the plaintiff bound by a decree in a proceeding to which he was not a party and of which he had no notice.

Second: Because the judgment of the Supreme Court of the State of Colorado, affirming the judgment

of the District Court in this cause, makes binding upon the plaintiff a decree in a proceeding to which he was not a party, of which he had no notice and from which he was barred by the statute under which said proceeding was commenced, prosecuted, and the said decree entered, and which deprived the plaintiff of his property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Third: Because the court adjudged that the plaintiff's action is barred by Sections 34 and 35 of the Irrigation Law of 1881, of the State of Colorado, said law being an act approved and in effect on February 23rd, 1881, the title of which is recited in the plaintiff's several replications in this action, and which is as follows:

> "An Act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and Supreme Courts, and for making record of such priorities and for payment of costs and expenses incident thereto,"

thereby depriving the plaintiff of his day in court and preventing him from adjudicating his right and title to the property involved in this action, as against the rights of the defendant, The Northern Colorado Irrigation Company, claiming the same property, and depriving the plaintiff of his said property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth: Because the irrigation statutes of the State of Colorado, of 1879 and 1881, the titles of

which are set out in the plaintiff's several replications in this action, are as follows:

> "An Act to regulate the use of water for irrigation and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use,"

Approved February 19th, 1879; and

> "An Act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and Supreme Courts, and for making record of such priorities, and for payment of costs and expenses incident thereto."

Approved February 23rd, 1881, and especially Sections 34 and 35 of said act of 1881, deprive the plaintiff of his property involved in this action, without due process of law, by preventing him from having his right and title to said property determined and adjudicated according to the law of the land.

Fifth: Because the statute of the State of Colorado entitled: "An act concerning irrigation division engineers and other irrigation officials, and repealing all other acts in conflict herewith," which act was approved and took effect April 4th, 1903, and under which act the defendant officers, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, acted, in closing the plaintiff's ditch, and in delivering to The Northern Colorado Irrigation Company, the other defendant, the water claimed by the plaintiff and involved in this action, in so far as the same authorizes

and empowers the said defendant officials to close the plaintiff's ditch in order to supply water to the defendant, The Northern Colorado Irrigation Company, under and pursuant to a decree in a proceeding to which the plaintiff was not a party and of which he had no notice, deprives the plaintiff of his property without due process of law, and is in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States, which statute, by the judgment of the court, remains operative and effective, and permits and authorizes the defendant water officials to take water claimed by the plaintiff out of his ditch, and to deliver the same to The Northern Colorado Irrigation Company, defendant, without any judicial determination of the rights of the said parties to the said water, and without an opportunity for such judicial determination.

Sixth: Because the act of the General Assembly of the State of Colorado entitled,

> "An Act to make further provisions for settling the priority of rights to the use of water for irrigation, in the District and Supreme Courts, and for making record of such priorities and for payment of costs and expenses incident thereto,"

approved and in effect February 23rd, 1881, and especially Sections 34 and 35 of said act, as construed, applied and enforced in this action by the Supreme Court of the State of Colorado, deprived the plaintiff of his property without due process of law and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

A consideration of the following constitutional and statutory provisions of the State of Colorado is deemed necessary to the decision of the case:

THE COLORADO CONSTITUTION:

"ART. 16, SEC. 5. The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"ART. 16, SEC. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

STATUTES OF COLORADO.

"An Act to Regulate the Use of Water for Irrigation and Providing for Settling the Priority of Right Thereto, and for Payment of the Expenses Thereof, and for Payment of

all Costs and Expenses Incident to Said Regulation of Use." Approved February 19, 1879.

"SEC. 19. For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the District Court of the proper county, but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December, in each year, shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose, as hereinafter provided for, shall be commenced; but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided, such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force."

Sec. 19, p. 99, Laws 1879, Rev. Stats. '08, Sec. 3276.

"SEC. 5. That the lands now irrigated, or which may be hereafter irrigated from ditches now taking water from the following described rivers or natural streams of the State of Colorado, are hereby declared to constitute irrigation districts."

Sec. 5, p. 97, Laws 1879, Rev. Stats. '08, Sec. 3353.

DISTRICT NO. 8. (ORIGINAL.)

"That District No. 8 shall consist of all lands irrigated by ditches taking water from Cherry Creek, Plum Creek and Platte River, and their tributaries, except Bear Creek, above District No. 2, and below the forks of the north and south branches of South Platte River."

Sec. 13, Laws 1879, p. 98.

DISTRICT NO. 8. (AS AMENDED.)

"That Water District No. 8 shall consist of all lands irrigated by ditches taking water from Cherry Creek, Plum Creek and Platte River and their tributaries, except Bear Creek, above Water District No. 2, and below the forks of the north and south branches of the South Platte River, and including all lands and ditches in Douglas County."

Sec. 1, p. 430, Laws 1899, Rev. Stats. '08, Sec. 3361.

DISTRICT NO. 23. (ORIGINAL.)

"That Water District No. 23 shall consist of all lands in the State of Colorado being or to be irrigated from ditches or canals taking water from the South Platte River and from any of its direct or indirect tributaries, at any point or points above Water District No. 8, in said State."

Act 1889, Sec. 9, p. 212, Laws 1889.

DISTRICT NO. 23. (AS AMENDED.)

"Water District No. 23 shall consist of all lands in the State of Colorado being, or to be, irrigated from ditches or canals taking water from the South Platte River, and from any of its direct, or indirect tributaries, at any point or points above Water District No. 8, in the said State, and all lands upon the tributaries of the Arkansas River which lie within the boundaries of Park County."

Act 1899, Sec. 1, page 431, Laws 1899, Rev. Stats. 1908, Sec. 3376.

"An Act to Make Further Provisions for settling the priority of rights to the use of water for irrigation; in the District and Supreme Courts; and for making record of such priorities; and for payment of costs and expenses incident thereto." Approved February 23, 1881.

"SEC. 1. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the 1st day of June, A. D. 1881, file with the Clerk of the District Court having jurisdiction of priority of rights to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of the priorities of water rights in district number . . . , as the case may be, which statement shall contain the name or names, together with the postoffice address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, canal or reservoir, the name thereof (if any) and, if without a name, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year, as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or

extension, and the present capacity of the ditch, canal or feeder of reservoir, and also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir. Said statement shall be signed by the proper party or parties."

Act 1881, Sec. 1, p. 142; Laws 1881, Rev. Stats. '08, Sec. 3277.

"SEC. 4. When, at any time after the first day of June, A. D. 1881, any one or more persons, associations or corporations, interested as owners of any ditch, canal or reservoir in any water district shall present to the district court of any county having jurisdiction of priority of rights to the use of water for irrigation in such water district according to the provisions of an act entitled: 'An Act to Regulate the Use of Water for Irrigation and Providing for Settling the Priority of Rights Thereto, and for Payment of the Expenses Thereof, and for Payment of all Costs and Expenses incident to said Regulation of use,' or to the judge thereof in vacation, a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to the use of water for irrigation between the several ditches, canals and reservoirs in such district, the court, or judge thereof in vacation, shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, as prayed

for, by an order to be entered of record upon such motion, petition or application, appoint a day, in some regular or special term of said court, for commencing to hear and take evidence in such adjudication, at which time it shall be the duty of the court to proceed to hear all evidence which may be offered by or on behalf of any person, association or corporation, interested in any ditch, canal or reservoir, in such district, either as owner or consumer of water therefrom in support of or against any claim or claims of priority of appropriation of water made by means of any ditch, canal or reservoir, or by any enlargement or extension thereof, in such district, and consider all such evidence, together with any and all evidence, if any, which may have been heretofore offered and taken in such district in the same matter by any referee heretofore appointed under the provisions of said act above herein mentioned, and also the arguments of parties or their counsel, and shall ascertain and find from such evidence, as near as may be, the date of the commencement of such ditch, canal or reservoir, together with the original size and carrying capacity thereof as originally constructed, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time spent, severally, in such construction and enlargement, or extension, and re-enlargement, if any, the diligence with which the work was in each case prosecuted,

the nature of the work as to difficulty of construction, and all such other facts as may tend to show the compliance with the law, in acquiring the priority of right claimed for each such ditch, canal or reservoir, and determine the matters put in evidence, and make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water, of the several ditches, canals and reservoirs, in such water district, concerning which testimony shall have been offered, each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements, or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal or reservoir, shall receive from the clerk, on payment of a reasonable fee therefor, to be fixed by the court, a certificate under seal of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal or reservoir, under and by virtue of the construction,

extension and enlargements thereof, severally; also specifying the number of said ditch and of each priority to which the same may be entitled by reason of such construction, extension and enlargements."

Act 1881, Sec. 4, p. 144, Laws 1881; R. S. '08, Sec. 3284.

"SEC. 6. Notice shall be given by the clerk of said court, of the time so appointed, by publishing the same in one public newspaper in such county into which such water district may extend; which notice shall be so published in such paper once in each week until four successive weekly publications shall have been made, the last of which shall be on a day previous to the day appointed as aforesaid. Said notice shall contain a copy of said order, *and shall notify all persons, associations and corporations interested as owners in any ditch, canal or reservoir in such water district, to appear at said court at the time so appointed and file a statement of claim under oath, in case no statement has been before filed by him, her or them, showing the ditch, canal or reservoir, or two or more such, in which he, she or they claim an interest, together with the names of all the owners thereof,* which statement may be made by any one of the owners of such ditch, canal or reservoir, for and in behalf of all; and also that all persons interested as owners or consumers may then and there present his, her or their proofs for or against any

priority of right of water by appropriation sought to be shown by any party by or through any such ditch, canal or reservoir (either as owner or consumer of water drawn therefrom). Ten printed copies of said notice shall also be posted in ten public places in such water district, not less than twenty days before the day so appointed, which copies shall be so posted by the party or parties moving the adjudication." (The italics are ours.)

Act 1881, Sec. 6, p. 147; Laws 1881; Rev. Stats. '08, Sec. 3286.

"SEC. 8. The party or parties moving such adjudication shall cause a printed or written copy of the notice aforesaid, published as aforesaid, to be served on every person, association or corporation, shown by the statement of claim on file, as provided in section one hereof, which service shall be made within ten days from the time of the first publication by the clerk, by any credible person certified by said clerk or referee to be such, by delivering such copy as aforesaid to the person to be served, if such person, by due diligence, can be found in the county of his residence. If such person cannot be found, as aforesaid, then, by leaving such copy at his or her usual place of residence, if he or she have such residence, in charge of some person of the age of fourteen years or over, there residing; and on any corporation, by delivering the copy to the president, or vice-

president, or secretary, or treasurer thereof, or the manager, or superintendent in charge of their ditch, canal or reservoir, or authorized agent or attorney, or by leaving such copy at the office or usual place of business of such corporation, and the proof of such service shall be made by affidavit of the person or persons serving said copies, showing when and how such service has been made on such party. In case of parties not served in any manner as aforesaid, the clerk shall deposit in the postoffice, duly enclosed in an envelope with the proper postage stamp thereon, a copy directed to the address of such party, shown in the statement of claim aforesaid, filed by him or her under section one hereof."

Act 1881, Sec. 8, p. 148; Laws 1881, R. St. 1908, Sec. 3288.

"SEC. 9. The court, in making such decree, as aforesaid, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs

by means of which such appropriations were made; whether such appropriations shall have been made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section one of this act, so as to show the order in priority of such ditch or canal and of such reservoir, and also of such successive appropriation of water pertaining thereto, for the information of the water commissioner of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered."

Act 1881, p. 149, Sec. 9; Laws 1881, Rev. Stats. '08, Sec. 3290.

"SEC. 34. Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time, within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ of injunction

shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order."

Act 1881, Sec. 34, p. 159; Laws 1881, Rev. Stats. '08, Sec. 3313.

After four years suit barred.

"SEC. 35. After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from set-

ting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree."

Act 1881, Sec. 35, p. 160; Laws 1881, Rev. Stats. '08, Sec. 3314.

"SEC. 22. No claim of priority of any person, association or corporation, on account of any ditch, canal or reservoir, as to which he, or she, or they shall have failed or refused to offer evidence under any adjudication herein provided for or heretofore provided for by said act, the title of which is recited in section four hereof, shall be regarded by any water commissioner in distributing water in times of scarcity thereof, until such time as such party shall have by application to the court having jurisdiction, obtained leave and made proof of the priority of right to which such ditch, canal or reservoir shall be justly entitled, which leave shall be granted in all cases upon terms as to notice to other parties interested, and on payment of all costs, and upon affidavits or petition sworn to, showing the rights claimed and the ditches, canals and reservoirs, with the names of the owners thereof against which such priority is claimed, nor until a decree adjudging such priority to such ditch, canal or reservoir, has been entered, and certificate, such as mentioned in section four hereof, shall have been issued to claim-

ant and presented to the water commissioner."

Act 1881, Sec. 22, p. 154; Laws 1881, Rev. Stats. '08, Sec. 3317.

"SEC. 25. No persons, association or corporation representing any ditch, canal or reservoir, shall be permitted to give or offer any evidence before said referee until he, she or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provisions of section one hereof."

Act 1881, Sec. 25, p. 155, Laws 1881, R. St. '08, Sec. 3316.

Re-argument—Review—Limitation two years.

"SEC. 26. The district court or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted, but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of."

Act 1881, p. 156, Laws 1881, Rev. Stats. '08, Sec. 3318.

"SEC. 27. Any party or parties representing any ditch, canal or reservoir, or any number of parties representing two or more ditches, canals or reservoirs, which are affected in common with each other by any portion of such decree, by which he, or she or they may feel aggrieved, may have an appeal from said district court to the supreme court, and in such case the party or parties joining, desiring an appeal, shall be the appellants, and the parties representing any one or more ditches, canals or reservoirs affecting in common adversely to the interests of appellants shall be the appellees. The party or parties joining in such appeal shall file a statement in writing, verified by affidavit properly entitled in such cause in the district court, which statement shall show that the appellants claim a valuable interest in the ditch, canal or reservoir, or two or more of such, which are affected in common with each other by some portion of said decree, also stating the name or names, or otherwise the description of the same, and the name or names or otherwise, the description of any one or more other ditches, canals or reservoirs, which by said decree derive undue advantage in respect of priority as against that or those represented by appellants; and also setting forth the name or names of the party or parties claiming such other one or more ditches, canals or reservoirs, affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other

parties as appellees. If the court or judge in vacation, on examination, find such statement in accordance with the statements of claim filed by the parties named as appellees, mentioned in section one of this act, he shall approve the same and make an order to be prepared and presented by the appellants allowing the appeal and showing the name or names of the appellants and appellees, with the name or names or description of the one or more ditches, canals or reservoirs, claimed by the party or parties appellant or appellee, as shown by their several statements of claim filed as aforesaid, before the taking of testimony, and fix the amount of the appeal bond, which bond shall be executed by one or more of appellants, as principal or principals, and by sufficient securities, and approved by the court or judge in vacation, and shall be conditioned for the payment of all costs which may be awarded against the appellants or any of them in the supreme court."

Act 1881, Sec. 27, p. 156, Laws 1881, R. St. '08, Sec. 3307.

Proceedings Before Referee.

"SEC. 10. When court may appoint referee—What referred. If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in open court, he shall, instead of the order mentioned in section four of this act, make and cause to be entered of record an order appointing some discreet person,

properly qualified, a referee of said court, to whom shall be referred the statement of claim aforesaid on file in said matter, the matter of taking evidence and reporting the same, making an abstract and findings upon the same, and preparing a decree in said adjudication; and also in case of any water district in which a referee has been heretofore appointed, and evidence taken by him under the provisions of the act, the title of which is recited in section four of this act; such evidence so already taken, together with the abstract thereof, and report of the referee who took the same, shall be also referred to said referee, to be appointed as aforesaid, and he shall proceed with his duties as hereinafter provided, first taking an oath of office, such as is required to be taken by referees in other cases under the provisions of the code of civil procedure."

Laws of 1881, p. 149, Sec. 10; Rev. Stats. '08, Sec. 3291.

"SEC. 11. Referee's notice—Contents—Publication—Posting Copies. Said referee shall prepare and publish a notice containing a copy of the order appointing him, in which notice he shall appoint a time or times, and place or places, suitable and convenient for the claimants in such water district, at which he will attend for the purpose of hearing and taking evidence touching the priority of right of the several ditches, canals and reservoirs in said district and notifying all persons,

associations, and corporations interested as owners or consumers of water to attend by themselves, their agents or attorneys, at the times and places appointed in said notice, and notifying such owners to then and there file a statement of claim in case such statement has not been already filed under the provisions of section one hereof, such as mentioned in section six hereof, and *present their proofs touching any priority of right claimed by them for any ditch, canal or reservoir in said district,* which notice shall be published in the same manner and times, and in all respects according to the provisions for publication of the newspaper notices mentioned in section six of this act, and proof of such publication shall be made in same manner as is provided in section seven of this act; and he shall also post ten or more printed copies of such notice in ten or more public places in said district, which copies shall be so posted at least twenty days before the time of commencing to take said evidence." (The italics are ours.)

Laws of 1881, p. 150, Sec. 11; Rev. Stats. '08, Sec. 3292.

"SEC. 13. Who may offer evidence. Said referee shall attend at the times and places mentioned in his notice for the purpose therein mentioned; and all persons, associations, choosing to do so, and being interested as owners of or consumers of water from any ditch, canal or reservoir in

said district, and may also attend by themselves, their agents or attorneys, before said referee, at some one or more of said times and places so appointed, and shall have right to offer any and all evidence they may think advisable for their interests in the matter to be adjudicated, as well in districts in which evidence has been heretofore taken as in other districts. All such evidence as has been heretofore taken, if any, in such district, shall be kept present by said referee, subject to inspection by any party desiring to examine the same for purposes of the investigation."

Laws of 1881, p. 151, Sec. 13; Rev. Stats. '08, Sec. 3294.

III.

ARGUMENT.

Under the provisions of the Constitution of Colorado, above printed, the right to use water from the public streams for irrigation is acquired by appropriation, and priority of appropriation gives the prior right as to time and quantity, between those using water for the same purpose. To determine the rights thus guaranteed, judicial proceedings are necessary in cases of controversies. The right to use water, in the State of Colorado for irrigation is real property.

Nichols vs. McIntosh, 19 Colo., 22, 27.

Gutheil Park Inv. Co. vs. Town of Montclair, 32 Colo., 420, 424.

The legislature of Colorado enacted a code of procedure whereby persons claiming water, within specified and prescribed districts, can determine, by judicial proceedings, between themselves, as to date, and amount of appropriation. This legislation hereinbefore set out in part will be designated as the Acts of 1879 and 1881.

The specification of errors is divided into six subdivisions, but the first four and sixth subdivisions cover substantially the same legal question and should be considered together. In this case both parties claim the right to use water from a common source, by virtue of decrees rendered in different jurisdictions.

The decree relied on by the defendants was rendered by the District Court of Douglas County, on December 10, 1883, in Water District No. 8.

The following facts alleged by the plaintiff in his replication (Record, page 15) and admitted by the demurrer, presents the principal issue:

> "And the plaintiff alleges that the aforesaid decree was made and entered in a proceeding instituted and pending in said Court for the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriations of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same Water District. That said proceeding was instituted and the said decree therein rendered, under and pursuant to certain Acts of the General Assembly of the State of Colorado, entitled, 'An Act to Regulate the Use of

Water for Irrigation and Providing for Settling the Priority of Right Thereto, and for Payment of the Expenses Thereof, and for Payment of all Costs and Expenses Incident to Said Regulation of Use.' Approved February 19, 1879.

Also an Act entitled 'An Act to make further provisions for settling the priority of rights to the use of water for irrigation; in the District and Supreme Courts; and for making record of such priorities; and for payment of costs and expenses incident thereto.' Approved February 23, 1881.

That plaintiff's ditch, mentioned in the complaint, named and known as the O'Neil Ditch, is located in Water District No. 23, and not in Water District No. 8.

That in the said proceeding in the District Court of Douglas County, wherein the decree of December 10th, 1883, mentioned in the answer, was rendered, the question concerning priority of appropriation of water between owners of ditches drawing water for irrigation purposes from the South Platte River, and its tributaries in Water District No. 8, and those drawing water from said stream in said Water District No. 23, was not heard, adjudicated or settled; and this plaintiff was not a party to said proceeding, had no notice of the same, and this plaintiff never at any time, in said proceeding litigated, and had no opportunity to litigate the matter between himself and the defendant, The Northern Colorado Irrigation Company, as to the relative rights between their said ditches,

> either as to time of appropriation or quantity of water appropriated."

The decrees provided for by the acts of 1879 and 1881 are to control and be effective only in the district where rendered.

The decree in question in this case was rendered in District No. 8.

Act of 1879, Sec. 19 (Sec. 3276, Rev. Stats.) provides for the adjudication, and the first clause reads as follows:

> "For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries *within the same water district.*"

The further or supplementary act of 1881, in Section 4 (Sec. 3284, Rev. Stats.) provides that the proceeding to adjudicate shall be commenced by presenting "a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigation between the several ditches, canals and reservoirs in such district." After the evidence is submitted the court shall "make and cause to be entered a decree determining and establishing the several priorities of right by appropriation of water *of the several ditches, canals and reservoirs in such water district, concerning which testimony shall have been offered.*"

In 1894 the Supreme Court of Colorado held as follows, concerning these adjudication decrees:

> "The irrigation acts provide for a separate adjudication of priorities for each irrigation (water) district, but not for the settling of priorities beyond the limits of the district. Act of 1879, Secs. 16-19; Act of 1881, Secs. 4, 9."
>
> Irrigation Co. vs. Downer, 19 Colo., 595, 599.

In 1896, the Supreme Court of Colorado held as follows:

> "The courts are still open for the purpose of entertaining the usual proceedings, statutory or otherwise, that have hitherto been found appropriate for determining the priorities between claimants for water for irrigation of lands situate in different districts."
>
> Independent Ditch Co. vs. Agricultural Ditch Co., 22 Colo., 513, 527.

There has been no legislation affecting the question since the foregoing decisions.

It is settled by the pleadings that the plaintiff was not a party to the decree in District No. 8, and it is apparent from the statute and the decisions of the Colorado Supreme Court that the plaintiff could not have been a party to that proceeding and the rights between the plaintiff and the Irrigation Company, defendant, were not and could not have been adjudicated in that proceeding.

The plaintiff's position and contention is well and fairly stated by the Colorado court in its opinion in this case. (Record, pp. 30-31.)

And we contend now that the construction placed upon Sections 34 and 35, act of 1881, deprives the plaintiff of his property without due process; and if Sections 34 and 35 of the said act are susceptible of the construction announced in this case, then the legislature of Colorado, by the two sections in question, has deprived the plaintiff of his property without due process.

Our contention is, briefly stated, that the four-years limit refers only to the parties in the district where the decree was made and entered. Who are the persons barred by Section 35? *All* persons? No. The persons barred are those who are setting up claims of priority *in such water district* adverse or contrary to the *effect* of such decree. The bar is against claims in *the district where the decree* is rendered and where it is effective, and not in some other district. It is reasonable to suppose that if the legislature had intended to bar all persons the words *in such water district* would have been omitted.

In Section 34, relating to suits and to injunctions, we also find the limitation to the district in which the decree is rendered, and to the district in which such rights may be claimed. To construe the limitation provisions in these two sections as applying to a decree and to parties beyond the district, would not be in harmony with the balance of the act of 1881, nor with the act of 1879, which it supplements, and would be contrary to the express intent of the legislature.

Only persons are barred, by Section 35, who set up claims *adverse or contrary to the effect of such*

decree. Under the acts of 1879 and 1881 the decrees had no effect beyond the limits of the district.

> "The irrigation acts provide for a separate adjudication of priorities for each irrigation district, but not for settling of priorities beyond the limits of the district."
>
> Irrigation Co. vs. Downer, 19 Colo., 595, 599.

If the Douglas County decree settled no priorities beyond the limits of District No. 8, how could it have effect in District No. 23, and how can plaintiff's claim be *adverse or contrary to the effect of such decree?* Under Section 35, after the lapse of four years after rendering a final decree, only those parties shall be deemed and held to have acquiesced in the same, *whose interests are thereby affected.*

The interest of the plaintiff sought to be litigated in this case was not affected by the decree in District No. 8 and he is not deemed in the language of the statute to have acquiesced in that decree.

It is apparent that the wrongful consequences complained of by the plaintiff is not the fault of the statute, but is the result of the construction of the statute by the Colorado court.

The portion of the opinion in the case at bar that is pertinent to the question at issue, reads as follows:

> "That Sections 34 and 35 apply to and were intended for the benefit of ditch and water right owners in water districts other than the one in which the decree was entered, and fixed the limit of time within which such

persons will be permitted to commence an independent action for the purpose of settling the relative priorities of ditches in different water districts, but that after such time had expired the decrees became conclusive. The court in the Fort Lyon case holds squarely that the four-year limitation statutes, Sections 34 and 35, apply and relate to the representatives of ditches in different water districts than the one in which the decree was entered, and are for their benefit, but that after four years from entering the decree in the different water districts, they become conclusive upon everyone, and bar the commencement of an independent action brought to determine the relative priorities of ditches in different districts."

(Record, pp. 32, 33.)

The decree in District No. 8 was entered December 10, 1883. The Colorado court says that decree is binding on the plaintiff, though he was not a party to the proceeding, had no notice of it and could not have been a party had he desired to contest defendant's claim or the claim of anyone else in District No. 8.

The plaintiff used the water claimed by him from May 10, 1879 (Record, p. 2), until 1910 and 1911, at which time the defendant water officials, at the instigation of the irrigation company, defendant, took the water from the plaintiff and gave it to the irrigation company. (Record, p. 3.) And the Supreme Court of Colorado says this is due process, because he is concluded by a judgment of which he certainly had no legal notice and of which he probably never heard

until the answer was filed in this case; and that he can be deprived of property which he has owned and enjoyed for 31 years, from 1879 to 1910, without interruption, so far as the defendant's claim is concerned.

This is not due process, as heretofore defined by the Supreme Court of Colorado, and this court:

> "It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed."
>
> Brown vs. City of Denver, 7 Colo., 305, 311.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."
>
> Scott vs. McNeal, 154 U. S., 34, 46; 14 Sup. Ct. Rep., 1108, 1112.

In Davidson vs. New Orleans, 96 U. S., at page 107, Justice Bradley says:

> "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law' provided by the State law when a citizen is deprived of his prop-

> erty; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

It is difficult to conceive of a more arbitrary, oppressive or unjust law or process of law to deprive one of his property than the statute involved in this case as construed by the Colorado court.

The natural and inherent principles of justice that are necessary elements in due process of law are entirely lacking in this case.

Whether the 1,184 cubic feet per second of time claimed for the High Line Canal is a claim entitled to priority over the plaintiff's claim has never been determined in any forum where the plaintiff was or could be heard. The plaintiff has the right to show, if he can, that the High Line Canal never diverted 1,184 cubic feet prior to plaintiff's appropriation of 28.83 cubic feet.

No one can be condemned in person or property without opportunity to be heard.

> Hagar vs. Reclamation Dist., 111 U. S., 701, 707.
>
> Holden vs. Hardy, 169 U. S., 366.

Sections 35 and 36 of the act of 1881, as construed by the Colorado court, are not the ordinary statutes of limitation, or statute of repose, enacted for the benefit of the individual. Such statutes are to a great extent in the discretion of the legislature, and when reasonable as to time will be construed as being due process. But the statute here under consideration is construed to be a bar because a decree without notice is said to have become conclusive against the plaintiff.

In a case involving the question whether or not a statute of the State of Colorado was obnoxious to Section 1, Article IV, of the Constitution of the United States, the Circuit Court of Appeals for the Eighth Circuit said, in Keyser vs. Lowell:

> "Counsel for the defendant in error invoked the rule that statutes of limitations are a part of the law of the forum, and that the states have the power and the right to prescribe the times within which actions may be brought against their citizens upon judgments, as well as upon other causes of action; * * * The general rule is conceded, but it is always conditioned by the proviso that such statutes must allow a reasonable time to enforce rights of action in the state of their enactment, that they may not lawfully strike down the right of action by destroying or denying all remedy for its enforcement, and that they may not repeal or nullify the provisions of the Constitution of the United States and of the Act of Congress which have been quoted. This law of Colorado is not a

> statute of limitations. It is a statute of nullification and prohibition. The essential attributes of a statute of limitation is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects."
>
> Keyser vs. Lowell, 117 Fed., 400-3-4.

The court in the Keyser case used strong language in characterizing the attempt of the Colorado legislature to bar actions in this state upon judgments of sister states under the guise of a statute of limitation. In the case at bar the legislature says to the plaintiff, in effect, "The District Court in Water District No. 8 may, under certain conditions, and at some future time, enter a decree determining valuable property rights, but you shall not be notified of the proceedings in which the decree is entered and you shall not be permitted to become a party to the proceeding as it does not concern you or your property. But four years after the decree is entered (according to the Colorado court) the decree is conclusive against you." As thus construed, the statute is contrary to common right and natural justice and obnoxious to the Fourteenth Amendment.

East Kingston vs. Towle, 48 N. H., 57.

In 1881, at the time this legislation was adopted, the consideration and determination of controversies over water rights for irrigation was comparatively new in Colorado and, in fact, in the whole arid region of the West. By the legislation of 1881 the legislature was entering upon an entirely new field in reference to adjudication of such rights. The water

being more valuable than the land, and the right to its use resting largely in parol, the legislature proceeded with extreme caution, and in order that no claim should be foreclosed within two years after decree was entered, provided, in effect, that any of the parties to the action might within two years come into court and apply for a re-argument and review of the decree. Further, as the act provided for service by publication, and as there were many non-resident claimants of water rights who might not receive notice for a longer period, the four-year statute was passed for the purpose of allowing such parties who had not theretofore appeared, further time to appear. The two statutes applied only as we have said, to those who had a right to appear in the proceeding and have their rights determined, and not to those who had water rights in other water districts, over whom the court had no jurisdiction.

It is to be noticed in passing that neither of these statutes makes any exception for the insane or for minors or others under disability.

The complaint in this case shows that plaintiff in error was in the full possession, enjoyment and use of his water rights from the 10th day of May, 1879, until the irrigation seasons of 1910 and 1911. Priority of right to the use of water of a natural stream in the arid region is a right peculiar in its nature. A party entitled to such priority, unless he can show that he is entitled to all the water in the stream, cannot in the very nature of things identify certain specific water as his own while the same is running in the stream; being entitled only to a certain quantity of water less than the whole, it is only after a proper

diversion of such water in his own separate ditch or lateral that the prior appropriator can be said to have title in kind to the specific water thus diverted. So long as the prior appropriator is able to secure the full amount of water to which he is entitled, he will not be heard to complain that some other person or persons are diverting his waters.

Saint vs. Guerrerio, 17 Colo., 448, page 454.

Wheeler vs. Northern Colorado Irrigation Co., 10 Colo., 587, 588.

As this action was commenced upon February 12, 1912, within two years from the first invasion of plaintiff's rights, it was therefore not barred by either the two or the four-year statute of limitations. In the case of Grosbeck vs. Seeley, 13 Mich., 329, the Supreme Court of Michigan had under consideration a statute declaring that lands bid off to the state at tax sales and not disposed of for five years vested in the state absolute title in fee simple, and as against one in possession the court held that this "is not a statute of limitations and is void as taking private property without due process of law." The decision is based upon the principle that one who is in actual or constructive possession of property cannot be compelled to take measures against an opposing claimant, and a law depriving him of the right of property in such a case "is in no sense a limitation law but an unlawful confiscation." (Pp. 343, 344.)

Cooley, in his work on Constitutional Limitations (4th ed., 1878), says in a footnote upon page 455:

"This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property when he already possesses and enjoys the property? The old maxim is, 'That which was originally void cannot by mere lapse of time be made valid;' and if a void claim by force of an act of limitation can ripen into a conclusive title as against the one in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed."

"Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims."

Cooley, Const. Limitations, 4th ed., p. 455; 7th ed., p. 523.

See, also:

Tiedman, State & Federal Control of Persons and Property (1900), p. 871.

Dingley vs. Paiton, 60 Miss., 1038, 1054.

Farrar vs. Clark, 85 Ind., 449.

Eldridge vs. Kruhl, 27 Iowa, 160, 175.

Baker vs. Kelly, 11 Minn., 358.

Buty vs. Goldfinch, 74 Wash., 532; 133 Pac., 1057; 46 L. R. A. (n. s.), 1065, and footnotes.

Lewis vs. Soule, 56 Iowa, 13; 2 N. W., 401, and footnotes.

Monk vs. Carbin, 58 Iowa, 13; 12 N. W., 571.

Pinkham vs. Pinkham, 60 Neb., 600, 610; 83 N. W., 837, 841.

Nind vs. Myers, 15 N. D., 400; 109 N. W., 335; 8 L. R. A. (n. s.), 157, and footnotes.

We have already shown that the Colorado statutes for the adjudication of water rights provide for a separate adjudication for each irrigation district and do not permit the settling in such a proceeding of priorities beyond the exterior limits of the district. (Irrigation Co. vs. Downer, supra.) As the District Court of Douglas County was without jurisdiction, its decree was and is without force and effect as to the rights of this plaintiff in error. It is therefore absolutely void as to him. We will now call attention to some Colorado cases in which it has been held that under similar conditions the court has uniformly held that there is nothing to set the statute of limitations in motion.

In the case of Gomer vs. Chaffee, the Supreme Court said:

> "It is difficult to see how the statute of limitations can avail a defendant holding a void deed; there was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession nor the right of actual possession.

"The limitation was intended to apply to cases where the provisions of the law had been complied with, not to void proceedings in violation of the law."

Gomer vs. Chaffee, 6 Colo., 314-317.

See, also:

Foster vs. Clark, 21 Colo. App., 192; 121 Pac., 130.

Dimpfel vs. Beam, 41 Colo., 25; 91 Pac., 1107.

Clark vs. Hough, 49 Colo., 197; 112 Pac., 542.

THE ACT OF 1878 AS AMENDED IN 1903.

The Fifth Assignment of Error (Record, p. 35) above specifically set out, attacks the constitutionality of the Act of April 4, 1903, referred to in the replication (Record, p. 21) and designated as Secs. 3349 and 3350 Rev. Stats. of 1908. This statute was originally enacted in 1878 and the only change made in 1903 that is material here, was changing the name of "superintendent of irrigation" to "irrigation division engineers," and for the sake of convenience we will designate this Act as the Act of 1878.

This Act divides the State into irrigation divisions; each division is composed of a number of water districts, as established by the Acts of 1879 and 1881.

Under the Acts of 1879 and 1881, and by the decrees authorized by said Acts, the water must be "dis-

tributed by the commissioner according to the decrees in the district."

Part of the Act of 1879 reads as follows:

> "It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same according to the prior rights of each respectively. * * *"
>
> Act of 1879, p. 99, Sec. 18; Rev. Stats. '08, Sec. 3432.

Section 19 of the same Act of 1879 provides in part as follows:

> "For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district. * * *"
>
> Act 1879, p. 99, Sec. 19; Rev. Stats. '08, Sec. 3276.

Section 4 of the Act of 1881, specifies what the decree shall establish:

> "And (The Court) shall make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water of the several ditches,

canals and reservoirs in such water district * * *"

Act of 1881, p. 144, Sec. 4, Rev. Stats. '08, Sec. 3284.

"The Court, in making such decree, as aforesaid, shall number the several ditches and canals, in consecutive order, according to priority of appropriation of water, thereby made by the original construction thereof, * * * for the information of the water commissioner of the district in distributing water; * * *"

Act of 1881, p. 149, Sec. 9; Rev. Stats. '08, Sec. 3290.

It is apparent from the statutory provisions hereinbefore quoted that the decrees entered under and pursuant to the Acts of 1879 and 1881, were not in force beyond the water district in which they were rendered, and that the water officials had no power or authority either by the terms of the decrees or by the statute to enforce them in any other district than where they were entered. And such is also the law as announced by the Supreme Court of Colorado, in 1894, as appears from the following, in a case already cited:

"* * * The irrigation acts above referred to, provide for separate irrigation districts, the territories of each district being more or less compact; they provide for determining priority of appropriation of water for irrigation purposes between ditch companies *within the same water district by a*

judicial decree to be rendered by the district court of the proper county; they provide for a commissioner for each irrigation district who is to supervise the distribution of water between the several ditches in pursuance of such decree, the commissioner being authorized to summarily execute and enforce the same. The irrigation acts provide for a separate adjudication of priorities for each irrigation district, but not for the settling of priorities beyond the limits of the district. Act of 1879, Sections 16-19; Act of 1881, sections 4, 9." (Italics are ours.)

"Priority is a relative or comparative term. An adjudication of priorities within the meaning of the irrigation acts, is the judicial determination of the claims of different parties to the use of water for irrigation within the same irrigation district; the decree of the court is required to specify, among other things, the amount of each party's appropriation and the order in which he is entitled to enjoy the same; to do this, the claims of the several parties must be considered in the same proceeding, and without this, there can be no determination of their relative or comparative rights, and, hence, no adjudication of their priorities."

"3. The water commissioner must have a decree in which the relative rights of the different ditches are clearly set forth in their order, else he has no certain guide to control his action. It is difficult to conceive what force, if any, a decree of priority in favor of an irrigating ditch would have, unless ren-

dered by the proper court in an appropriate proceeding and in the proper irrigation district; unless so rendered and entered, it would be foreign to the subject matter of the proceeding. * * *"

Irrigation Co. vs. Downer, 19 Colo., 595, 598, 599.

In the case last above cited we have a construction of the effect of the decree rendered in District No. 8 and that construction is, in substance and effect, that it has no force or effect beyond the district in which it was rendered, and that it did not bind the plaintiff or limit his rights to the use of water in District No. 23, and declares a rule of property. Where, then, and by what authority, did the water officials obtain the right or power to close the plaintiff's ditch and deliver the water flowing into his ditch, in District No. 23, to the irrigation company, defendant, in District No. 8?

The admitted allegation of the plaintiff's replication (page 21 of the Record) discloses the power assumed by the defendant water officials, which allegation is as follows:

"That he is informed and believes and upon such information and belief alleges, that the said defendants, Charles W. Comstock, Fillmore Cogswell and Alonzo Wright, in closing plaintiff's ditch, as alleged and complained of in the complaint, assumed to act and did act, under and pursuant to an Act of the General Assembly of the State of Colorado entitled 'AN ACT CONCERNING IRRIGATION DIVISION ENGINEERS

AND OTHER IRRIGATION OFFICIALS, AND REPEALING ALL ACTS IN CONFLICT HEREWITH,' which act was approved and took effect April 4th, 1903.

"The plaintiff alleges that the State of Colorado, by the aforesaid act, so far as the same authorizes the defendants to close the plaintiff's said ditch to supply water from the same to the defendant, The Northern Colorado Irrigation Company, under and pursuant to the said decree of the District Court of Douglas County, has deprived and is depriving the plaintiff of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

To this replication, a demurrer was filed and sustained. The parts of the act referred to in the foregoing replication that are pertinent here are as follows:

"The office of Superintendent of Irrigation is hereby declared abolished and in place of such superintendents the Governor shall, subject to confirmation by the Senate, appoint five persons, who shall be known as Irrigation Division Engineers, who shall be qualified to perform the duties devolving upon them as hereinafter provided, * * *"

Sec. 1, p. 281, Laws 1903; Rev. Stats. '08, Sec. 3335.

"The duties of the Irrigation Division Engineer shall be as follows: He shall be

governed by all acts heretofore enacted relative to superintendents of irrigation and shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the State Engineer, execute the laws of the State relative to the distribution of water in accordance with the right of priority of appropriation, as established by judicial decrees.

He shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force, but for the better discharge of his duties, he shall have the authority to make such other regulations, to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation as may, in his judgment, be needed in his division; Provided, such regulations shall not be in violation of any part of this act or other laws of the State, but shall be merely supplementary to and necessary to enforce the provisions of the General Laws and Amendments thereto."

Sec. 9, p. 284, Laws 1903; Rev. Stats. '08, Sec. 3344.

The superintendents of irrigation, referred to in the foregoing statute, who were superseded by the division engineers were created and these duties defined by the act of 1887, which is in part as follows:

"Sec. 7. Within thirty days after his appointment, said superintendent of irrigation shall send to the clerk of the district court

within his division, of such counties as have had rendered by the district court of such county, judicial decrees, fixing the priorities of appropriation of water for irrigation purposes for any water district, a notification of his appointment to such office, and shall request of the said clerk a certified copy of every decree of the district court establishing priorities of appropriation of water used for irrigation purposes within that district. Thereupon, it shall be the duty of such clerk, within ten days after the receipt of such request from said superintendent of irrigation, to prepare a certified copy of all decrees of such district court establishing priorities of water rights made within that district, under the provisions of the general statutes of the state of Colorado, and transmit the same to the superintendent of irrigation requesting it. Said superintendent of irrigation shall then cause to be prepared a book to be entitled 'The Register of Priorities of Appropriations of Water Rights for Water Division No.—, State of Colorado,' within which he shall enter and preserve such certified copies of decrees. Said superintendent of irrigation shall, from such certified copies of decrees, make out a list of all the ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals or reservoirs,

may bear within their respective water districts. Said superintendent of irrigation shall make from his register a tabulated statement of all the ditches, canals and reservoirs in his division, whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal and reservoir arranged in separate columns. The name of the ditch, canal or reservoir, its number in his division, the district in which it is situated, the number of it in its proper district, the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty. In case any decrees of court establishing priorities of appropriation of water for irrigation purposes are made after the transmittal of the copy of previous decrees to the superintendent of irrigation, it shall be the duty of the clerk of the court wherein such decree is rendered, to transmit to the superintendent of irrigation of the district within which said county is situated, within ten days after it is rendered, a copy of such decree, and the superintendent of irrigation shall enter the same in his register, such register to be filed and kept in the office of the State Engineer."

Act 1887, Sec. 7, p. 297, Laws 1887; Rev. Stats. '08, Sec. 3349.

"Sec. 9. All water commissioners shall make reports to the superintendent of irri-

gation of their divisions as often as may be deemed necessary by said superintendent. Said report shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of that district; the amount of water actually coming into the district to supply such ditches, canals and reservoirs; whether such supply is on the increase or decrease; what ditches, canals or reservoirs are at that time without their proper supply; the probability as to what the supply will be during the period before the next report will be required, and such other and further information as the superintendent of irrigation of that division may suggest. Said superintendent of irrigation shall carefully file and preserve such reports, and shall, from them, ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water; and if it shall appear that in any district in that division any ditch, canal or reservoir is receiving water whose priority post-dates that of the ditch, canal or reservoir in another district, as ascertained from his register he shall at once order such post-dated ditch, canal or reservoir shut down and the water given to the elder ditch, canal or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals and

reservoirs may be located. The reports of water commissioners by the superintendents of irrigation shall be filed and kept in the office of the State Engineer."

Laws 1887, p. 298, Sec. 9, Rev. Stats. '08, Sec. 3350.

It being admitted by the pleadings that the defendant water officials acted under the Act of 1887, supplemented by the Act of 1903, when they closed plaintiff's ditch and turned his water over to their co-defendant, the question then is: Do those acts construed and taken together as they must be, if enforced as they were in this case, deprive the plaintiff of his property without due process of law?

The decree in Water District No. 8, which the defendants enforced in this case was rendered December 10, 1883 (Record, p. 29). This decree was not in force beyond the limits of the district in which it was rendered. This is clear from the language of the acts of 1879 and 1881, hereinbefore quoted, as well as by the decision of the Supreme Court of Colorado in a case already referred to, in which that court says, in 1894, relative to these water decrees:

"The irrigation acts, above referred to, (Acts of 1879 and 1881), provide for separate irrigation districts, the territories of each district being more or less compact; they provide for determining priority of appropriation of water for irrigation purposes between ditch companies *within the same water district by a judicial decree to be rendered by the district court of the proper*

county; they provide for a commissioner for each irrigation (water) district who is to supervise the distribution of water between the several ditches in pursuance of such decree, the commissioner being authorized to summarily execute and enforce the same. The irrigation acts provide for a separate adjudication of priorities for each irrigation district, but not for the settling of priorities beyond the limits of the district. Act of 1879, Secs. 16-19; Act of 1881, Secs. 4, 9."

(The italicised part of above quotation is by the court in the official report.)

Irrigation Co. vs. Downer, 19 Colo., 595, 599.

On the same page, in the above case, we read:

"An adjudication of priorities within the meaning of the irrigation acts, is the judicial determination of the claims of different parties to the use of water for irrigation within the same irrigation district."

The decision just referred to has never been overruled, changed or modified, by the Supreme Court of Colorado. In the case at bar no suggestion is made or intimation given that the limitation of these water decrees, as announced in the case of *Irrigation Co. vs. Downer,* is not the law, and is not a correct construction of the Acts of 1879 and 1881, as to the effect of these decrees.

We submit, therefore, in all seriousness, that in

1910 and 1911, when the defendant water officials took the water from the plaintiff, the decision of the Colorado Court that a water decree rendered in one district is not binding in another district, was a rule of property in the State of Colorado, and that decision and the rule thereby established should be followed by this court.

The defendants therefore had no authority to go into District No. 23 to enforce the decree rendered in District No. 8, except by reason of that part of the act of 1887 which authorizes the division engineer to direct the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division and without regard to the district within which the ditches, canals and reservoirs may be located. (Sec. 9 of Act of 1887, Rev. Stats. '08, Sec. 3350.)

This condition, then, presents itself in this case: The legislature authorized and empowered the executive officers, by an act in 1887, to enforce a decree rendered in 1883, beyond the territorial jurisdiction of the court that rendered the decree and against a person who was not a party to the proceeding, had no notice of it, and was expressly barred by the statute in force at the time of the proceeding from becoming a party. In other words, the legislature attempts to make a judgment, three years after it is rendered, binding against a party as to whom it was absolutely null and void when rendered.

It is difficult to conceive of a more arbitrary, oppressive or unjust law or process of law than a statute which makes a judgment or decree binding against a person that is not binding without the statute.

In the case at bar the Douglas County decree is

absolutely void as to the plaintiff, but is attempted to be made effective against him by the statute of 1887 and its substitute. This is in violation of the "due-process-of-law" provision.

> "An act of the legislature undertaking to validate a judgment of a court which is void for want of jurisdiction would be an attempted exercise of judicial power by the legislature, since, the proceedings in court having been void, it would be the statute alone which should constitute an adjudication upon the rights of the parties; and it would also be objectionable as contravening the constitutional provision which secures to every man the enjoyment of his property except as the same may be taken from him by 'due process of law,' for this last phrase includes the attaching of jurisdiction, due notice and an opportunity to be heard."
>
> Black on Judgment, Sec. 218 (1st Ed.).

The plaintiff is entitled to his day in court before it can be judicially determined that the defendant irrigation company is entitled to a priority for 1,184 cubic feet of water of a date prior to his appropriation.

> "It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken or the charge becomes absolute against

either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed."

Brown vs. City of Denver, 7 Colo., 305, 311.

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. And such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist."

Scott vs. McNeal, 154 U. S., 30; 14 Sup. Ct. Rep., 1108, 1112.

The construction of the act of 1887, making the decrees binding upon persons, who were by the express provisions of the statute barred from the proceedings in which the decree was entered, as to the date and amount of appropriation is contrary to natural justice.

It is not giving the citizen the "equal protection of the law," with reference to his property rights, guaranteed by the Fourteenth Amendment.

The law afforded the water users in the districts an opportunity to litigate their respective rights, but

as between them and those outside the district, no such opportunity was given, but the legislature assumed to adjust those rights; this is not the "equal protection of the law" the citizen is entitled to.

The plaintiff, under every principle of law and justice, is entitled, in this proceeding, to have his rights adjudicated, both as to date of priority and quantity of water between himself and the defendant irrigation company, and also the question of the right and authority of the official defendants to close the plaintiff's ditch.

We submit that the rights of the plaintiff, secured to him by the Federal Constitution, have been invaded by the legislation referred to and the construction given the same by the Colorado court, and that the plaintiff is entitled to the relief, denied by the state court, at the hands of this court, regardless of the form or purpose of the state law or the judgment of the state court in the construction of that law.

Coppage vs. Kansas, 236 U. S., 1.

St. Louis Southwestern R. Co. vs. Arkansas, 235 U. S., 350, 362.

Railroad Company vs. Wright, 207 U. S., 127; 24 Sup. Ct. Rep., 692.

Scott vs. McNeal, 154 U. S., 34, 40, 49.

In the case of Scott vs. McNeal the Supreme Court said:

> "Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the

thing condemned being first seized into the custody of the court. The Mary, 13 U. S., 9 Cranch, 126, 144 (3, 678, 684); Hollingsworth vs. Barbour, 29 U. S., 4 Pet. 466, 475 (7, 922, 926); Pennoyer vs. Neff, 95 U. S., 714, 727 (24, 565, 570). And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, 'unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.' Rose vs. Himely, 8 U. S., 4 Cranch, 241, 269 (2, 608, 617). Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. Thompson vs. Whitman, 85 U. S., 18 Wall., 457 (21, 897)."

The grounds upon which the judgment of the state court is based cannot avail, because its effect is

to deprive the plaintiff of a constitutional right, and we ask that its judgment be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 68.

DANIEL O'NEIL, PLAINTIFF IN ERROR,

v.

THE NORTHERN COLORADO IRRIGATION COMPANY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT.

The water shed of the South Platte River, embracing the South Platte River and its tributaries in Colorado, is designated under the irrigation laws of the state as Irrigation Division No. 1. This division is divided into eleven water districts, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 23 and 64. District 23 embraces the territory drained by the North Fork of the South Platte and the South

Fork of the South Platte; District 8 joins District 23 and extends from the junction of the two forks to the mouth of Cherry Creek, which flows into the Platte River at the City of Denver; District 2 extends from the mouth of Cherry Creek to the mouth of the Cache la Poudre River; District 1 extends from the mouth of the Cache la Poudre to the west line of Washington County; District 64 extends from the west line of Washington County to the east line of the state. All these districts are on the main river. District 3 embraces the Cache la Poudre drainage, a tributary of the South Platte; District 4 embraces the Big Thompson drainage, a tributary of the South Platte; District 5 embraces the St. Vrain River, a tributary of the South Platte, except Coal Creek and Boulder Creek; District 6 embraces the drainage of Coal Creek and Boulder Creek, tributaries of the St. Vrain; District 7 embraces the drainage of Clear Creek, a tributary of the South Platte; District 9, the drainage of Bear Creek, a tributary of the South Platte.

Priorities in the right of use in the waters of the streams and the amount appropriated under each priority are adjudicated and fixed by decrees entered by the District Court in each Water District under Special Statutory proceedings. The priorities are decreed to the ditches for the use of the appropriators and users thereunder. The several or individual rights of the appropriators or users under the ditches are not determined.

The priority decreed to the Highline Canal, owned by defendant, The Northern Colorado Irrigation Company, was entered in Water District No. 8 on December 10, 1883, by the District Court of Douglas County. No question is made by plaintiff as to the regularity of the procedure or the validity of the decree; and the decree remains in full force and effect. Under this decree said

canal was given a priority in the waters of the South Platte River for 1184 second-feet as of January 18, 1879.

The plaintiff claims under a decree entered in water district No. 23, October, 1889, by the District Court of Park County, which decree gave to plaintiff's ditch priority for 23.83 second-feet of water as of May 10, 1879, several months junior to the decree awarded to defendant's ditch, the High Line Canal.

By this action the plaintiff seeks to ignore these decrees and to try out the question as to the seniority of appropriation as between the two ditches, independently of the decrees heretofore entered.

The defendant, The Northern Colorado Irrigation Company, claims that the priorities of these respective ditches were settled by the respective decrees entered under our adjudication proceedings; that as neither of these decrees was questioned within the four years' time allowed by the statute for attacking the same, the decrees are absolute, and that this action is barred by such statute of limitation.

The plaintiff, in reply, claims that the statute providing that no action can be brought attacking such decrees after four years from the time of the decree, and the decisions of our Supreme Court construing and upholding that statute deprives plaintiff of his property without due process of law and thus contravenes the 14th amendment of the constitution of the United States. The plaintiff also claims that the acts of the water officials, done in performance of duties prescribed by the Act of 1903, deprive it of its property without due process of law.

It is stated by plaintiff that the defendants "Do not rely upon the fact that the High Line Canal has a right

prior to the O'Neil Ditch by reason of prior diversion and application, but rely and justify their acts complained of solely upon the Douglas County decree."

The defendant, The Northern Colorado Irrigation Company, pleads this decree to the High Line Ditch and the priority rights fixed thereby, and recites in its answer, among other things, that this decree fixed the priority of the High Line Ditch as of January 18, 1879, senior to the claim made by plaintiff, and that said defendant was taking water from the South Platte River and its tributaries by virtue of said decreed priority at the times complained of by plaintiff; that this decree remains in full force and effect, and pleads the bar of the four-year statute.

Pleading the decree made it unnecessary to plead the facts which must have existed as a condition precedent to the rendition of the decree.

Medano Ditch Co. v. Adams, 29 Colo. 317, at 320.

We therefore insist that the facts before this court are that the defendant, The Northern Colorado Irrigation Company, claimed a priority to the use of water prior to that claimed by plaintiff, and that it based its rights not only upon the decree, but upon a prior appropriation, of which fact the decree is conclusive evidence.

We mention this in passing, to correct the statement by plaintiff, but we cannot see where it has any bearing upon the question to be decided by this court.

The entire scheme for settling and regulating and distributing water in this state at all times is based upon our statutory provisions having application to matters in the state only; that is, they are of local application.

The priority of right to use in the waters is fixed by decrees entered in the various ditches.

The regulation and distribution of the water by the water officers is based upon the decree so entered. This is true not only as to the regulation within the respective districts, but as to the regulation between the several districts. The decrees are in the nature of process, authorizing the police or water officers of the state to distribute the water to the ditches, the priority rights of which have been decreed in the regular course.

Ashenfelter et al. v. Carpenter et al., 37 Colo. 534.

After the entry of any decree and partly for the purpose of observing the operation under it, any ditch owner or appropriator in the district for whose ditch claim was made in the proceedings, is given two years to appeal therefrom.

Canal Co. v. Ft. Morgan R. & I. Co., 27 Colo. 214.

Or any claimant for water in the district might file a petition for a review, with or without the introduction of further testimony; but after the expiration of the two years the decree cannot be questioned by anyone who was either actually or constructively a party thereto.

Broad Run Inv. Co. v. Deuel Co., 47 Colo. 573.

Section 34 of the Act of 1881, set forth in plaintiff's brief, has a two-fold purpose. First: It preserves to water users (not actually or constructively parties to the adjudication proceedings), who are interested in the use of water from the stream, a right to question the decree

entered in any district, or any priority awarded thereby by suit within four years from the time the decree is entered. Second: It prohibits injunctions against the water officers to prevent the enforcement by them of the decrees until the decrees shall be modified, and the water officials shall have official notice of such modification.

Section 35 is a statute of limitation or repose, and prohibits any person whose interests are affected by the decree from bringing an action attacking the decree or any priority awarded thereby, after four years from the entry of the decree, and it is specifically declared that all parties shall be deemed to have acquiesced in the decree, except in the case of those who have brought suits before the expiration of that period. It also bars any person from setting up any claim to priority of right to water for irrigation in the *water district* adverse or contrary to the effect of such decree.

These sections have been definitely construed by our Supreme Court, and construed according to the spirit and the letter, to the effect that after the expiration of four years, such decrees cannot be questioned by any person in or out of the district.

Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co., 39 Colo. 332.

Decided at the January term, 1907;

Lower Latham Ditch Co. v. Bijou Irr. Co., 41 Colo. 212;

Broad Run. Co. v. Deuel & Snyder Imp. Co., 47 Colo. 573;

Rogers v. Nevada Canal Co. et al., 60 Colo. 59;

O'Neill v. Nor. Colo. Irr. Co., 56 Colo. 545.

The last case being the case at bar.

BRIEF AND ARGUMENT.

I.

CONSTRUCTION.

This court will accept the construction given by the state court to the legislative enactments of such state, of local application.

Green v. Neal's Lessee, 6 Peters, p. 291;
Williams v. Gaylord, 186 U. S. 157;
Clariborne Co. v. Brooks, 111 U. S. 400;
Forsythe v. Hammond, 166 U. S. 506, *p. 518;
Smiley v. Kansas, 196 U. S. 407.

In the case of *Green v. Neal's Lessee, supra,* it appears that the federal courts had reached a decision upon the interpretation of the statutes of limitations in the state of Tennessee, following a state decision. Thereafter the state decision was changed, and the question in the case was whether the federal court would change its decision to conform to the last decision rendered in the state court, and the federal court held that it would do so, giving as a ground that the construction of a state statute by the courts of the state makes the construction a part of the statute law; adding thereto (at page 298): "The same reason which influences this court to adopt the construction given to the local law in the first instance is not less strong in favor of following it in the second, if the state tribunal should change the construction."

We make particular reference to this decision only for the reason that plaintiff apparently contends that the Supreme Court of Colorado has changed the construction given to the sections in question.

From a careful reading of the Colorado decisions we are unable to discover that there has been any change of

views on the part of the Colorado Supreme Court. The case of *Irrigation Co. v. Downer,* 19 Colo. 595, merely held that the irrigation acts do not provide for the settling of priorities in any district beyond the limits of that district.

This in no wise conflicts with the construction given to the sections here referred to. If the adjudication in one district would settle the priorities in other districts of the same division, then the decrees would have become final within two years. For the very reason that they did not extend to other districts, the users of water from the same source of supply were given the four years' time to bring actions attacking priorities awarded by decrees rendered in districts outside of their own district.

In the case of *Independent Ditch Co. v. Agricultural Ditch Co., 22* Colo. 513, a case which contains much interesting and instructive information concerning the growth of water rights in Colorado, the question as to the construction of sections 34 and 35 was not at issue, and was not presented to nor considered by the court.

It was there held that under the Act of 1887 the decrees were made *prima facie* evidence between the districts, and that until the decrees were modified or changed, through some proper proceeding, the water officers must distribute the water of the entire water division in accordance with the decrees in the several districts.

To the same effect is the case of *McLean v. Farmers High Line Canal & Res. Co.,* 44 Colo. 184.

In the case of *Montrose Canal Co. v. Loutsenhizer D. Co., 23* Colo. 233, decided in November, 1896, we think the state Supreme Court very clearly indicated the position it would take—and afterwards did take—in the

Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co. case, *supra.*

In every case decided by the Supreme Court prior to the *Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irr. L. Co.* case, 39 Colo. 332, the litigation was either between the parties in the district, and who were properly parties to the decree, or else the question of limitation was not raised at all.

The statute construed by the state court is of local application, and the construction placed thereon does no violence to the letter or the spirit of the Act, in fact, it appears to be the only construction which can, in reason, be given.

THEREFORE:

> *The question before this court is whether the state statute as construed by the state court violates the Fourteenth Amendment of the Constitution of the United States.*

The plaintiff calls attention to the fact that District No. 23 was not created until 1887. This did not affect plaintiff's right to question defendant's priority awarded by the District 8 decree. Being a water user from the stream the right of action existed regardless of whether his point of diversion was in any created district. The purpose of the action authorized by Section 34 is to enable a water user to attack a decreed priority on the ground that the priority decreed does not represent the true state of facts, that is, that the right decreed has been given a priority dating earlier than the facts justified, or has been granted for a greater quantity of water than was actually appropriated, and other matters of that class. On the other hand, if the priority decreed *does* represent the true facts and gives the true date of priority and the

true amount appropriated, then no good could be accomplished by attacking it.

This four-year statute of limitation has no relation to and does not interfere with the right to adjudicate priorities in any other district by the proper court of such other district. To illustrate: the priorities were decreed in District No. 8 in 1883 District No. 23 was not then created, nor was it created until 1887. After its creation, adjudication proceedings were begun in that district and the decree entered in 1889, more than four years from the entry of the prority decree for District 8. The jurisdiction of the court in District No. 23 to adjudicate the priorities in that district in adjudication proceedings was not affected by Section 35. That section applied to suits attacking priorities previously awarded by other decrees. The proper court in District 23, regardless of the fact that four years had elapsed since the entry of the decree in District 8, could decree the prorities in District 23 and such priorities decreed would in turn become immune from attack in four years thereafter.

Under the laws of 1887 and 1903 all the decrees from the time of their entry are *prima facie* evidence as between the different districts. In making up the chronological table by the Division Engineer for the distribution of water in the whole division, the priorities decreed are placed according to the dating fixed by the decrees and any modifications thereof.

Independent Ditch Co. v. Agricultural D. Co.
22 Colo. 513-527.

Sections 34 and 35 of the Act of 1881 make them conclusive evidence as between the districts if not attacked by suit within the four-year period.

Section 35 does not, however, affect actions brought upon matters arising subsequent to the entry of the decree; such as abandonment, of the whole, or any part, of a priority after it has been decreed.

II.

Character of property, decreed right and purpose of legislation.

The character of property dealt with by the legislative acts and the state decisions is a right of use in the waters of a natural stream and the priority of such right as between the various users; the property in the water being in the public.—*Art. XVI., Sec. 5, Colo. Const.*

The appropriator does not own the body of the water, but has merely a right to divert from the stream under his appropriation not exceeding the amount of his appropriation when needed by him for beneficial application.

Strickler v. Colo. Springs, 16 Colo. 61;
Independent Ditch Co. v. Agricultural D. Co. 22 Colo. 513;
Sieber v. Frink, 7 Colo. 148;
Kidd v. Laird, 15 Calif. 161;
Wiel on Water Rights in Western States (3rd ed.), Secs. 17 and 18.

His appropriation fixes the maximum amount he can draw from the stream under his priority, but, notwithstanding this maximum, he cannot, under the law, draw more than needed for beneficial application, nor can he permit waste.

Act of 1876, p. 78;
Revised Statutes Colorado 1908, Secs. 3238 3239;

Mills' Ann. Stats. 1912, Secs. 3764-3765;
Burkhart v. Meiberg, 37 Colo. 187, 190;
La Jara Creamery Co. v. Hansen, 35 Colo. 105.

In the practice of irrigation, water is not applied to crops all the time. To illustrate: Alfalfa—of which we generally raise three crops—the first crop may be irrigated twice during April and May, each irrigation taking about five days; the second crop, two like irrigations in July; and the third crop, two like irrigations in August and September; thus making thirty days' irrigation for the season. Crops of wheat and oats will not require over two weeks' irrigation, occurring in June and July. Potatoes and beets are late crops, irrigated in July and August—and so on. So any one appropriator having an appropriation, say, of five second-feet, will probably not take the water thereunder for more than a total of fifty days out of the season, and for much of that time will take only a portion of his maximum appropriation.

When such prior appropriator is not using water under such prior right, the water goes to the benefit and use of the junior appropriators in the order of their priority.

Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 399, 400;
Vogel v. Minnesota Canal Co., 47 Colo. 534, 540, 541, 542.

Under such conditions, it is therefore apparent that a stream producing, say, 100 second-feet of water might sustain and furnish a reasonable supply of water for more than 300 second-feet of miscellaneous appropriations.

While the right of use for a beneficial purpose is held by the appropriators in the order of their priorities to the maximum amount decreed, but limited to the extent of

their needs, the public holds the property in the water, and is vitally interested in its beneficial use to the fullest extent by all appropriators.

Therefore, we think it proper and logical to state it in this way:

In every appropriation, three parties are primarily interested, and those interests are limits upon each appropriation.

First, the appropriator: He secures a right to divert and apply when needed by him for beneficial use and according to the date of his appropriation, an amount of water not in excess of his maximum right.

Second, junior appropriators, as against whom the senior appropriator cannot increase his appropriation, either in quantity or point of time of diversion, nor so use his appropriation as to change the conditions upon the stream to the injury of such junior rights.

La Jara Creamery Co. v. Hansen, 35 Colo. 105;
Vogel v. Minnesota Canal Co., 47 Colo. 534, 540, 541;
Ft. Collins M. & E. Co. et al. v. Larimer and Weld Irr. Co., 58 Colo. 183, 143 Pac. 1091.

Third: *The Public:* Because it is the owner of the property in which the use is granted to the appropriator. It is the reversioner when the use terminates or is not needed or is abandoned. It is vitally interested in having the water put to beneficial application. It guards the same so that no waste thereof will be made. Its necessities require that the water do as large service as possible.

In providing these adjudication proceedings and method for the orderly distribution of stream waters the state exercised its police powers.

Farmers Co. v. Southworth, 13 Colo. 111;
White v. Farmers Co., 22 Colo. 191;
Lamson v. Vailes, 27 Colo. 201;
Ft. Lyons Co. v. Chew, 33 Colo. 392;
Roberson v. People, 40 Colo. 119-125.

III.

Police Regulations.

To leave the distribution and apportionment of this water among themselves, to the consumers, would, and in fact did, prior to the operation of the present laws, lead to contention, strife and breaches of the peace; so it was found necessary to enact laws to bring about (a) the judicial determination of priority rights and (b) the control and distribution of, the water to the ditches according to priority rights, and as required by the needs for irrigation, under the police power of the state.

It was with these things in view that the enactments or system of laws referred to were adopted.

The field to be covered was new, and the experience, both as to practical irrigation and the proper method to govern and protect the same, was limited. Some mistakes were made, but, on the whole, the system adopted has been found to be good.

The most serious mistake made was the division of one water shed into several water districts for the purposes of adjudication of water rights and distribution of the waters. This mistake was a natural one, as everyone wanted to settle his priorities and troubles as close to his own door as possible. This mistake caused confusion in the distribution of water by the water commissioners of the various districts. Therefore, by the Act of 1887, amended in 1903, certain measures were passed,

providing in the main for the tabulation, chronologically, of all priorities decreed in the various districts of an entire irrigation district, appointing a head officer for the irrigation division to supervise the districts and the water commissioners therein in making the distribution, and to bring about a better distribution of the water under the priority decrees in the entire division.

Act of 1887, *Session Laws* 1887, p. 295.

This act is set forth and discussed in:

Independent D. Co. v. Agricultural D. Co., 22 Colo. 513;
McLean v. Farmers Highline Co., 44 Colo. 184;
Act of 1903, *Sess. L. of* 1903, *p.* 281, *R. S.* 1908, *pp.* 896 *et seq.*, and is commented on in—
Rogers v. Nevada Canal Co., 60 Colo. 59.

IV.

Limitations on Actions to Question Priorities Decreed.

It was early recognized that these rights would be a fruitful source of litigation, and that some statute of repose should be enacted, so there was incorporated into the adjudication statutes of 1881 the provisions heretofore referred to as Section 26, providing for re-argument and review; Section 27, providing for appeals; Section 34, allowing four years for suit attacking the priorities; and Section 35, barring all suits after four years.

By these sections any party to a decree in any district was permitted to appeal to the Supreme Court, or any actual or constructive party could petition for a rehearing or review, with or without the introduction of further

testimony, at any time within two years from the date of the decree. Or any water user from the stream or tributaries in the water shed or division not a party to the decree could attack any of the priorities awarded by the decrees, by an independent action, within four years (*Sec. 34*), but no action could be brought after four years (*Sec. 35*).

Thus there was a limit placed upon the time within which any action could be brought attacking the decrees, to-wit, four years from the entry of the respective decrees. As to all parties not bringing an action within such period, the decrees would become absolute.

It is this Section 35, as construed by the state court, that is assailed by the plaintiff, on the ground that to make the decree absolute at any time, or, rather, by fixing a limit of time beyond which it could not be questioned, would, as to water users outside the district where the decree is rendered, deprive them of property without due process of law.

The proceedings to adjudicate priorities of rights to the use of water are *sui generis*, and are proceedings *in rem*. They designed to prevent unending litigation, and to bring about an orderly distribution of the public waters to persons having a right of use therein.

> *Louden Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 110, 111 to 114.
> *Roberson v. People*, 40 Colo. 119, 123.
> *Combs v. Farmers Highline Co.*, 38 Colo. 420, 428.

All users from the stream and its tributaries are given an opportunity to be heard, either by becoming a party or by bringing an independent suit within four years.

The users in the district where an adjudication is had have actual or constructive notice prior to the hearing, by reason of the service and publication or process or notice. In addition thereto, such users in the district have two years after the decree is entered to have the decree corrected on account of errors or omissions.

The users from the same stream, but taking water in another district, have notice:

(a) Of the statute dividing their irrigation division into water districts, and of the statute designating the particular water districts comprising the water division or water shed;

(b) Of the fact that water adjudications will be made under such statute in each of such districts;

(c) That these adjudications in the districts will become absolute and final in the entire water division and against them, unless attacked by proper suit within four years from the time of their entry.

Sec. 35, *Laws* 1881, *supra;*
Ft. Lyon Canal Co. v. Ark. Val. Co., 39 Colo. 332;
Broad Run Irr. Co. v. Deuel & S. Co., 47 Colo. 573;
O'Neill v. Nor. Colo. Irrig. Co., 56 Colo. 545;
Rogers v. Nevada Canal Co., 60 Colo. 59, 71, 72.

Knowing these things, the water users in other districts of the same division, although not directly made parties to the adjudication proceedings cannot close their eyes and shut their ears to what is being done as to diversion from the same water supply from which they

take, nor to the adjudications had in the districts in their division or watershed.

Williamson v. Beardsley, 137 Fed. 467;
Steinbeck v. Bon Homme Co., 152 Fed. 333.

It was early held that the irrigation acts of 1879 and 1881 were intended to provide a system of procedure for the judicial determination of priority of rights to the use of water for irrigation as between ditches taking water from the same stream. The system contemplated determining the rights for the entire watershed.

Platte Water Co. v. Nor. Colo. Irrig. Co.,
12 Colo. 525, 529.

When these decrees are entered they become public records, and as such are open notice to the public. The users from the stream, having been put upon notice by the statute, must follow up that notice and see what is done thereunder.

After the decrees are entered the waters of the stream are distributed by the water officials in accordance therewith, and the users from the stream, whatever district within which they may divert have actual knowledge of such diversion. The water distributed under any decree, in any district, is from the same supply, and every user in any district is necessarily affected thereby, and must know of any such diversions adverse to his claim. The decrees entered in one irrigation division, until modified or changed, must be considered as an entirety, and the water of the natural streams thereof distributed in accordance therewith, although the diversion and use of the water are made at points beyond the territorial limits of the particular water district or county in which the decrees were entered.

Rogers v. Nevada Canal Co., 60 Colo. 59, 71
and cases therein cited.

The court will take judicial notice that the Continental Divide runs through the state from north to south, dividing the state almost in halves; that practically all streams with which we have to do have their source in the state, and that the watersheds of the state are not of such extent as to make it unreasonable to impose the duty upon the water users to keep informed and within a reasonable time to protect their right of use in the public waters, as against any decrees entered in the division. This duty imposed upon the water users is one necessary for the public welfare. It is necessary because:

(a) The rights must be settled so the state authorities policing the stream may properly distribute the waters to those having a right of use, in an orderly manner, and according to priorities, and the needs under such priorities.

(b) The waters appropriated must be determined, and, in one sense of the word, segregated, so the public will know what waters are appropriated and what remain for further appropriation.

(c) The right of the appropriators in the entire watershed or division must be settled so as to avoid confusion and strife between the various water districts in the division, otherwise the water officers cannot perform their duties.

Several suits have been prosecuted through to the Supreme Court of Colorado involving the rights between users in the various districts, in which the State Engineer and Division Engineer have been made parties, which cases show the intimate relations between the priorities as adjudicated in the various districts, and the reasons

why the decrees and system of distributing water thereunder must apply to the entire irrigation district. See:

Comstock, State Engineer, v. Ramsay, 55 Colo. 244;

Comstock, State Engineer, v. Larimer & Weld Res. Co., 58 Colo. 186;

Comstock, State Engineer, v. Ft. Morgan Res. & Irr. Co., 60 Colo. 101;

Rogers v. Nevada Canal Co., supra.

The last case cited was an action by various water users in Districts 2, 7, 8, lying below District 23 on the South Platte river drainage, against the water users in District No. 23, being the same district in which the plaintiff in this case takes his water, charging a conspiracy among the water users of District 23, to take the waters from the stream in defiance of the decree entered in the various districts and in defiance of the orders of the water officers, and the court was asked to grant an injunction against the junior appropriators taking such water as against the senior appropriators below, and also asked to grant an injunction commanding the water officers to distribute the water in accordance with the various decrees entered in the entire division.

The decision of the court in this case is instructive as showing the difficulties that are encountered by the priority holders in securing their rights and having the distribution of the water made in accordance with the decrees, and of the water officers in enforcing the law and also as showing the growth to the present time of the irrigation system in the state. It illustrates the necessity of having the water rights and claims judicially determined and settled as near as they may be in order that we may have an orderly distribution of the waters from the streams.

V.

Due Process of Law.

The right to be heard, or, as often termed, "the day in court," does not mean that each water user shall be or can be made a party to the proceeding. If, under the system provided, the user is given a way or an open door through which he can reasonably enter and protect his claim, then his right to be heard, or his "day in court," has been protected. It is not necessary that he should enter a particular door, but any door that is left open gives this right.

One remedy the plaintiff had was an independent action, preserved by Section 34. If there was no limitation as to the time within which that remedy, or any remedy which might be found proper, could be pursued, plaintiff would not contend that the decree in District 8 deprived him of his property without due process of law. So the question necessarily resolves itself into whether the state has the right to limit the time within which the remedy or remedies may be followed. The fixing of reasonable limitations upon the time for bringing such actions is within the power of the state, and does not contravene the Fourteenth Amendment.

American Land Co. v. Zeiss, 219 U. S. 47, 60, and cases there cited.
Great Western Tel. Co. v. Purdy, 162 U. S. 329, 338;
Davis v. Mills, 194 U. S. 451, 456, 457.

Nor does the fact that the statute of limitations fails to exempt infants, married women or other persons under disability, subject it to such claim. The state may or may not make such exceptions.

Vance v. Vance, 108 U. S. 514, 521.

The door is open, under the four-year statute in question. It cannot be contended, with reason, that the time so fixed within which he can enter the door and have his "day in court" is an unreasonable time.

Here, again, is where the public welfare is to be considered. Public welfare requires that the contentions of private claimants, who are users in the property of the public, even as against adverse claimants, must at some time come to a state of repose.

No owner or claimant of a private right, as against public welfare, can ignore the provisions of the law made to settle such right, giving him a reasonable opportunity to settle and protect his own. Such owner cannot insist that this claim, like the brook, shall run on forever. Because the public welfare requires him to assert his claim within some specific time or even in a specific manner, or else lose it, is no basis for a contention on his part that he has been deprived of his property without due process of law. The state has the unquestioned right to cut off litigation; to enact statutes of repose; to fix a time beyond which claims cannot be asserted in the courts.

Barker v. Harvey, 181 U. S. 481.

If a claimant has a remedy provided by law, under which he can assert his claim within a reasonable time, then he has his "day in court." If he fails to assert it within such time, then he, not the law, is at fault. He has sinned away his day of grace.

Terry v. Anderson, 95 U. S. 628.

Suppose we had enacted these irrigation statutes without any limitation as to the time when attacks could be made upon the priorities decreed, and had found, after our decrees were entered, that they were open to con-

tinuous invasion, attack and change by claimants for water in the division, on the ground asserted in this action, and then, with this experience, and to quiet and end such litigation, our legislature had passed a statute requiring all claimants to bring their actions to impeach or change the decrees within four years from the taking effect of the act, otherwise that such rights of action would be barred, could it be said that such act would deprive the claimant of property without due process of law, or deprive him of his "day in court," or that it was unreasonable, or that the legislature was without power to pass it?

Because our legislature, when enacting the adjudication statutes, were wise enough to foresee that such litigation would arise and might be endless, and that a time should be fixed after the decrees were entered within which they might be questioned, and with this in view the legislature did, by the same act, and in advance, fix such reasonable time, making it a part of the system itself, does that change the principle? Do such provisions, made in anticipation, deprive one of property without due process of law, any more than the subsequent enactment would?

Discussion of Plaintiff's Contentions.

The fallacy of plaintiff's position is: he contends that because he did not have the particular remedy desired by him, he has not had his "day in court," and therefore reasons that he could refuse to accept or pursue the remedy provided by law for his protection, and on this he claims protection under the Fourteenth Amendment.

No person is greater than the law. Legislative enactments are conclusively presumed by the courts, in their enforcement, to provide the greatest good for the great-

est number, unless they violate some constitutional provision. The legislature, in its wisdom, may take away or withhold particular remedies or remedy, provided it leaves some adequate remedy. The remedy provided is a matter for legislative judgment.

It is contended that many of the priorities decreed are for amounts in excess of water actually appropriated or needed. We must assume that the testimony supporting the decrees was true; that the decrees all declared the true time when appropriations were made, and gave no more water than that actually applied and needed. At any rate, those matters are not questions for this court. They are pertinent here only as showing that plaintiff made proof of the time and amount of his appropriation, and obtained his decree; also that defendant made proof of the time and amount of its appropriation; and obtained its decree. Both decrees are conclusively presumed to be correct; and plaintiff's priority, as fixed by the courts, is junior to that of defendants. The plaintiff did not, within the four years allowed, question the correctness of defendants' decree, nor did plaintiff pray for an appeal from or a review of the adjudication proceedings in District 23 in which his *own* priority was decreed to him, nor did he in any manner question its correctness. He is now barred by the statute.

Plaintiff was not precluded by the law from questioning defendants' decree. The law provided the way and time within which it could be questioned. If plaintiff failed to accept the provisions of the laws, it is his fault, and not the fault of the law.

CONCLUSION.

The statute barring suits attacking the adjudication decrees was passed in 1881. In *Ft. Lyons Canal Co. et*

al. v. Arkansas Valley Co., 39 Colo. 332, decided by our Supreme Court at the January term, 1907, the four years' limitation fixed by this statute was construed as applying to all claimants for water from the same stream and its tributaries, even though the diversion was made in another district. It was held, upon re-hearing, in an able opinion rendered by Justice Gabbert, that such statute and the construction given it did not contravene the constitution of the United States or of the State of Colorado. Said opinion is based largely upon the opinion of this court in *Barker v. Harvey*, 181 U. S. 481. Since then, covering a period of more than nine years, the doctrine of the Ft. Lyon case, *supra*, has been the accepted doctrine of the state, and has been followed in:

Lower Latham D. Co. v. Bijou Irr. Co., 41 Colo. 212;
Broad Run Co. v. Deuel & Snyder Co., 47 Colo. 573;
Kerr v. Burns, 42 Colo. 285;
Rogers v. Nevada Canal Co. et al., 60 Colo. 59;

and in the case here on error.

To now disturb that doctrine would practically undo all that has been done in settling these troublesome irrigation questions and would bring about endless litigation which would involve, and the result of which would be controlled by, conditions existing many years ago; real knowledge of which has passed away, and been lost by, the death of the old settlers, and has passed from the memories of those who remain. Any testimony now obtainable of the conditions of such earlier times would not be according to "the sight of the eyes," but would be warped and colored by "the wandering of the desire."

In the decrees entered in Irrigation Division No. 1 some of the priorities date back as far as 1859 and there are many dated in the Sixties. "Great enterprises have been successfully launched on the faith and credit of the rights thus established. Without these rights the farms which have become valuable through the industry of the farmers of the state, and which represent much in the way of labor and capital, as well as the many enterprises dependent upon them, in which vast sums have been invested, would practically be destroyed. Stability of title to the right to the use of water is just as important to maintain as stability of title to any other class of property." (*Gabbert, J., in Ft. Lyon v. Arkansas Valley, supra.*)

More than fifty years have elapsed since the occurrence of the facts upon which the earlier priority rights were decreed. To now declare that these rights are not settled and final and the priorities secured thereby not fixed and certain, would tear up and set at naught the entire structure of the irrigation system of the State of Colorado and render valueless the great things done during the many past decades in the settlement of these questions and open wide the door to endless litigation, fraud and perjury and would accomplish only disaster and destruction.

We respectfully submit there is no error in the decision of the State court.

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